THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1210

RICHARD H. OLSEN,

Petitioner

v.

SAUL GOODMAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on the 7th day of November, 1974, and an order denying a petition for rehearing entered on January 29, 1975.

OPINIONS BELOW

The Final Judgment of the Circuit Court of Dade County, Florida, dated March 17, 1972, was not reported, but is printed

at Appendix A hereto.

The Order of the District Court of Appeal, Third District, dated November 17, 1972, dismissing the Appeal, is reported in 269 So.2d 782, and is printed at Appendix B hereto.

The Opinion of the Supreme Court of Florida, dated May 9, 1973, reversing the District Court of Appeal and reinstating the Appeal is reported in 278 So.2d 612, and is printed at Appendix C hereto.

The Opinion of the District Court of Appeal, Third District, dates March 12, 1974, affirming the final judgment of the Circuit Court of Dade County, *per curiam*, is reported in 291 So.2d 71 and is printed at Appendix D hereto.

The Opinion of the Supreme Court of Florida, dated November 7, 1974, reversing the District Court of Appeal, is reported in 305 So.2d 753, and is printed at Appendix E hereto.

The Order of the Supreme Court of Florida, dated January 29, 1975, denying a rehearing, is not reported, but is printed at Appendix F hereto.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on November 7, 1974. A petition for rehearing was denied on January 29, 1975. An Order Extending Time To File Petition For Writ of Certiorari to and including June 27, 1975, was entered on April 12, 1975.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 2101(c).

THE QUESTIONS PRESENTED

1. Does the decision of the Supreme Court of Florida, conferring upon itself jurisdiction in this cause, under Article V, Section 3(b)(3) of the Constitution of the State of Florida, where no such jurisdiction existed, conflict with the Fourteenth Amendment to the Constitution of the United States by denying Petitioner due process of law?

2. Does the decision of the Supreme Court of Florida

denying the standing of the Petitioner by its reversal of a jury verdict in favor of Petitioner, and the affirmance of said jury verdict by the *per curiam* decision of the District Court of Appeal of the State:

(a) Conflict with Articles One and Four of the Constitution of the United States by the Court's failure to give full faith and credit to the Laws of New York governing contracts, which laws were applicable in this cause?

(b) Conflict with the Seventh Amendment to the Constitution of the United States, which Amendment was adopted in full by Article One, Section Two of the Bill of Rights of the Constitution of the State of New York by denying Petitioner the right to trial by jury on the issue of usury?

(c) Conflict with the Fourteenth Amendment to the Constitution of the United States by the Court's refusal to give effect to a substantive defense, arising under contract, which defense is valid in the state wherein the contract was made and was performed?

STATEMENT

I. NATURE OF CASE:

This Petition grows out of an appeal to the Florida Supreme Court from the District Court of Appeal, Third District, reversing that Courts *per curiam* affirmance of the jury verdict in favor of the Petitioner rendered in the Circuit Court of Dade County, Florida.

II. PERSONS INVOLVED:

THE PETITIONER: Richard H. Olsen is a member of the Florida Bar having been admitted in 1957, and an investor.

THE RESPONDENT: Saul Goodman is a retired banker of forty years experience having been the Vice Chairman of the Board and Executive Vice President of the Gary Trust and Savings Bank of Gary, Indiana.

III. THIS CASE:

This cause involved an action at law on a contract dated September 17, 1968. Under the terms of the contract, Olsen, the defendant below and the Petitioner herein, was borrowing $150,000 to purchase 25,000 shares of the capital stock of Omega Equities Corporation. Goodman, the plaintiff below and the Respondent herein, was lending Olsen the money and depositing with him an additional $150,000 for the purchase of the same amount of stock for his personal account.

The contract between the parties provided the loan to Olsen would be repaid in eight (8) months and thirteen (13) days. It further provided that Goodman, the lender, as a consideration of the loan, had the right to demand that Olsen, the borrower, repurchase Goodman's stock at a profit of $100,000.

In addition to Goodman and Olsen, there were other individuals purchasing stock in Omega who had given their money to Olsen, as a trustee, for their purchases.

At the trial, it was disclosed that Olsen received a check payable to Richard H. Olsen, Trustee, from Goodman for $300,000. The check was endorsed in the presence of Goodman, by Olsen as Trustee, payable to Omega Equities Corporation for deposit only and subsequently delivered to Omega, in New York, with the combined funds of the other investors, for the purchase of the stock.

The day following the delivery of the funds to Omega and prior to the Goodman check clearing collection at his bank, Goodman called Olsen, who had returned to Florida, and advised him that he had stopped payment on the $300,000 check. Goodman demanded a payment of $25,000 before he would permit the check to be cleared. Olsen, to protect the funds of the other investors, negotiated the sum down to $10,000 and wired, by Western Union, Goodman the funds whereupon Goodman permitted his check to clear collection.

The written contract was prepared, signed and executed in the State of New York and there was no indication that performance would occur any place other than New York.

After maturity of the note, Olsen paid $50,000 of the $150,000 as demanded by Goodman but when he failed to

make a further payment, Goodman filed a lawsuit in the Circuit Court of Dade County, Florida. The first count of the lawsuit demanded the repayment of the $150,000 loaned and the second count sought damages for Olsen's alleged failure to buy back the stock from Goodman at the guaranteed price giving Goodman a profit of $100,000.

The principal defense interposed by Olsen to the lawsuit was that the contract was usurious under the applicable laws of the State of New York and, therefore, unenforceable. Goodman, in his Amended Answer, admitted the transaction occurred in New York and that the New York law should apply.

The case, after two days of trial before a jury, with the application of the laws of New York, resulted in a verdict for Olsen followed by a judgment thereon.

Goodman entered an appeal to the Third District Court of Appeal in Florida but failed to file a brief within the time prescribed by the Florida Rules of Appellate Procedure. Olsen filed his brief and two weeks later filed a motion to dismiss the appeal. At a hearing on the motion to dismiss, the motion was granted and the appeal dismissed.

Goodman then petitioned the Supreme Court of Florida for a writ of certiorari which writ was subsequently granted. A panel of the Supreme Court reinstated the appeal and remanded the cause to the District Court to be heard on its merits. The District Court of Appeal issued a *per curiam* affirmance of the jury verdict in favor of Olsen.

Subsequently, Goodman again sought a writ of certiorari from the Supreme Court on a claim of conflict of jurisdiction pursuant to Article 5, Section 3(b)(3) of the Constitution of the State of Florida. The conflict claimed was between the *per curiam* holding of the District Court of Appeal and the opinion in the *State of Florida, ex rel., the Florida Bar v. Delves*, 160 So.2d 114, and the *Florida Bar v. Pitts*, 219 So.2d 427, which cases are concerned entirely with an interpretation of the integration rules of the Florida Bar and not with the usury law of the State of New York.

A panel of the Supreme Court, with a dissenting opinion, granted certiorari on a conditional basis and subsequently reversed the District Court of Appeal. The Judgment of reversal

remanded the cause to the Circuit Court of Dade County for re-trial with directions prohibiting the interposition of the defense of usury.

A petition for rehearing was filed by Olsen. The Petition, in part, set forth the lack of jurisdiction of the Supreme Court to grant the writ of certiorari where no conflict existed with annexed hereto as Petitioner's Exhibit No. 3. The Petition, in part, set forth the lack of jurisdiction of the Supreme Court to grant the writ of certiorari where no conflict existed with respect to the laws of New York to give them jurisdiction. The Petition further set forth the denial of due process of law to Olsen by the prohibition of the use of the defense of usury and a jury trial as guaranteed by the Constitution of the State of New York. The Petition was denied on the 29th of January, 1975.

On April 10, 1975, Olsen filed a Motion for Extension of Time Within Which to File Petition for Writ of Certiorari to this Court. As grounds for the Motion, Olsen cited the impeachment proceedings being conducted by the House Select Committee on Impeachment, investigating three of the Florida Supreme Court Justices, all of whom had participated on the panels adjudicating the two Goodman-Olsen appeals. This Court granted the extension through June 27, 1975.

During the course of the impeachment hearings, Justice Dekel resigned from the Court and the Committee then concentrated its investigation on Justice McCain. It was Justice McCain who became the lead Justice in both Goodman appeals. Testimony and exhibits of record indicated irregularities in the Goodman-Olsen appeals. The confidential files of the Court revealed that, in the first Goodman appeal, case #43,168, it was initially assigned to Justice Ervin, who was to be the lead Justice in the case. A jurisdictional memorandum in the file recommended a denial of jurisdiction, but it had been crossed out. A second jurisdictional memorandum on reassignment, edited by Justice McCain, was next in the file and it recommended granting the writ without oral argument. Cases are normally assigned Justices on a blind selection basis. The second Goodman appeal, case #45,356, again had Justice McCain being the lead Justice. Prior to the Committee completing further investigation in this matter, Justice McCain

resigned from the Court, thus concluding the Committee's investigative power. The third Justice under investigation, Justice Boyd, rather than being impeached was referred to the Judicial Qualifications Commission for a mental examination and for determination of his capacity to continue on the Court. There is printed as appendices G, H and I the affidavit of the Staff Director of the Committee on Judiciary of the Florida House of Representatives and the confidential files of the Florida Supreme Court relating to the Goodman-Olsen appeals.

REASONS FOR GRANTING WRIT

As to question one, the Constitution of the State of Florida, as amended, Article V, Section 3(b)(3) provides that the Supreme Court:

> "(3) may review by certiorari any decision of a District Court of Appeal that affects a class of Constitutional or State Officers, that passes upon a question certified by a District Court of Appeal to be of great public interest, or that is in direct conflict with a decision of any District Court of Appeal or of the Supreme Court *on the same question of law*, and any interlocutory order passing upon a matter, which upon final judgment would be directly appealable to the Supreme Court; and may issue Writs of Certiorari to Commissions established by general law having statewide jurisdiction." (Emphasis supplied)

The Appellant below (Goodman) sought to have the Florida Supreme Court take jurisdiction of his petition for certiorari on the grounds of conflict. It is obvious then, from Article V, Section 3(b)(3) of the Florida Constitution that the Court must find a conflict *on the same question of law* which was enunciated by the *per curiam* decision of the District Court of Appeal, Third District, and the cases cited in Appellant's petition and brief.

The Florida Supreme Court has set forth, in numerous cases, what constitutes a conflict. In the case of *Nielsen v. City of Sarasota*, 117 So.2d 731 at 734, 735 (1960), said Court defined its limitation of Jurisdiction in stating:

> "Under Article V, Florida Constitution, as amended

effective July 1, 1957.[1] *the power of this Court to issue writs of certiorari was substantially restricted and drastically circumscribed*. While the Courts of Appeal and the Circuit Courts were endowed with unlimited authority to issue writs of certiorari within the orbit of their own jurisdiction, *the power of this Court to issue such writs, although unlimited prior to the amendment was subjected to substantial constitutional restraints when the amendment was adopted*. The so-called 'conflict jurisdiction' was not conveyed to the Supreme Court merely to convert it into a 'court of selected errors' whereby the Justices of this Court could whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of this Court.

"On the contrary, *in order to sanctify the decisions of the Courts of Appeal with an aspect of finality*, so essential to prevent any imbalance in the several echelons of the appellate process, the jurisdiction of this Court to exercise certiorari powers and to set aside the decisions of the Courts of Appeal on the conflict theory was expressly limited by the Constitution itself. *Ansin v. Thurston*, Fla, 101 So.2d 808.

"When our jurisdiction is invoked pursuant to this provision of the Constitution, we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called 'justice of the case' as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory *we must find in that decision a real, live and vital conflict within the limits above mentioned*." (Emphasis supplied)

In the case of *Kyle* v. *Kyle*, 139 So.2d 885 at 887 (1962), the Florida Supreme Court said:

> "The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. *We have said that conflict must be of such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter.*" (Emphasis supplied)

[1] Article V, Florida Constitution was further amended in 1972. No change regarding conflict certiorari was made except to permit the Supreme Court to grant a writ where an opinion of a District Court of Appeal was in conflict with a prior opinion rendered by that District Court.

The Appellant below, in his petition and supporting brief for certiorari relied upon two cases: *State of Florida, ex rel. the Florida Bar v. Delves*, 160 So.2d 114 (1964) and *Florida Bar v. Pitts*, 219 So.2d 427 (1969), to support his contention that a conflict existed between the *per curiam* decision of the District Court of Appeal and the cited decisions of the Supreme Court of Florida.

The *Delves* and *Pitts* cases, *supra*, are wholly and completely involved with the construction and the interpretation of the Integration Rules of the Florida Bar Association. Neither case has the remotest relationship to, nor is it similar with the factual issues or the law presented in the case *sub judice*. Both cited cases involved disciplinary proceedings, initiated through the filing of a grievance with the Florida Bar Association, which grievance was governed by the Integration Rules of that Association. Those cases, being interpretations of quasi criminal administrative regulations, are not applicable in an action at law governed by the Statutes of a sister state.

In the case *sub judice*, the litigants agreed the laws of the State of New York were applicable. This was confirmed by the Trial Court, confirmed by the District Court of Appeal and further confirmed by the Panel of the Supreme Court of Florida in its Opinion rendered November 7, 1974.

It is obvious that decisions rendered by the Florida Supreme Court in matters involving disciplinary proceedings under the administrative regulations of the Integration Rules of the Florida Bar Association cannot be used to establish a "conflict" as required by Article V, Section 3(b)(3) of the Constitution of the State of Florida in an action at law under the laws of the State of New York.

The cited cases of *Delves* and *Pitts*, *supra*, have no application whatsoever, to the law in the matter tried below. No conflict of any kind exists between the *per curiam* Order of the District Court of Appeal and the cases relied upon by the Appellant below. The Panel of the Florida Supreme Court, therefore, lacked the power to confer upon itself jurisdiction in this case under the provisions of Article V, Section 3(b)(3) of the Constitution of the State of Florida. The exercise of such illegally assumed jurisdiction by said Court has denied Petitioner equal protection and due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

As to question number two, the law of the state where the contract was made will generally be applied in the forum to the exclusion of the law of the forum. This is especially so when the law of the place of contracting is asserted as a defense to an action brought in another forum.

In the case of *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 at 160 (1932), this Court, with respect to the enforcement of a right conferred by a statute of another state, drew a distinction between a case where the right asserted is sought to be affirmatively enforced and a case where the right asserted is pleaded as a defense. The case involved an action for death by wrongful act brought in New Hampshire. By way of affirmative defense, the defendant pleaded that the remedy sought was not provided for by the terms of the Vermont Workmen's Compensation Statute.

The plaintiff contended that the provisions of the Vermont Workmen's Compensation Statute which forbade resort to common-law remedies was contrary to the public policy of New Hampshire, where the action was instituted, because the New Hampshire statute allowed an election of remedies, and that, accordingly, the full faith and credit clause did not require New Hampshire Courts to enforce a statute of another state which was obnoxious to its public policy. In sustaining the defense of the employer that the rights of the employee were confined to those prescribed by the Vermont statute, the Court said:

"It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies. Thus, a *plaintiff* suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy ... or because it fails to provide procedure appropriate to its determination ... or because the enforcement of the right conferred would be obnoxious to the public policy of the forum ... But the *company* (the employer) *is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another state*. The right which it claims should be given effect is set up by way of defense to an asserted liability; and *to a defense different considerations apply*. ... A state may, on occasion, decline to enforce a foreign cause of action. In so doing it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But *to refuse to give effect to a substantive defense under the applicable laws of another state*, as under the circumstances here presented, *subjects the defendant to irremediable liability. This may not be done.*" (Emphasis supplied)

The rationale of the *Bradford* case, *supra*, was followed in the case of *Holderness, et al., v. Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F.Supp. 145 (1944). Plaintiffs, citizens of North Carolina, sued on an insurance policy issued by a New York corporation covering a building in North Carolina. The contract was neither executed nor delivered in Florida, nor was it performed there. The action being transitory, was commenced in a Florida state court and subsequently removed to the Federal District Court. The suit was instituted more than twelve months after the fire. Defendant asserted the suit was barred by a contract provision that no action thereon shall be sustainable in any court unless commenced within twelve months next after the fire. Plaintiff replied that in Florida this provision is contrary to public policy and therefore unenforceable. The Court, in finding for the defendant said:

"A state can not extend the effect of its laws beyond its

own borders so as to destroy or impair contract rights not operative within its own jurisdiction, and valid where made. *When defensively asserted, foreign contract rights must be recognized by the local forum even though contrary to local public policy, if such rights are valid, and performance is to be had, where the contract was executed.* To decline to recognize such rights for defensive purposes in the local forum effectively deprives the party of a right valid where made and to be performed. *If he can not assert it is a defense, the right is wholly lost to him. Thus the contract obligation, valid where made and to be performed, is impaired, contrary to Art. 1, Sec. 10, of the Federal Constitution. Due Process and full faith and credit in its enforcement are denied, contrary to Sec. 1 of the 14th Amdt, and Art. 4, Sec 1, of the Constitution.*" (Emphasis supplied)

See also *Hartford Accident & Indemnity Co., v. Delta & Pine Land Co.*, 202 U.S. 143 (1934); *Home Insurance Company v. Dick*, 281 U.S. 397 (1930); and *John Hancock Mutual Insurance Company v. Yates*, 299 U.S. 178 (1936).

The panel of the Supreme Court of Florida, in reversing the *per curiam* affirmance by the District Court of Appeal, of a jury verdict in favor of the Appellant herein, chose to totally disregard the application of New York law and, in fact, took a position contrary to the position established in the Florida case of *Confederation Life Association v. Ugalde*, 151 So.2d 315 at 318 (1963), where the Court said:

"When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a *defense lawfully vested under the law of the latter jurisdiction may not be ignored by the forum* if that state had no significant connection with the contract obligations. *Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States* and Section 12 of the Declaration of Rights of Florida, F.S.A., *Home Ins. Co. v. Dick*, 281 U.S. 307, 50 S.Ct.338, 74 L.Ed. 926, 74 A.L.R. 701 (1930); *Hartford Accident & Indemnity Co., v. Delta Pine & Land Co.*, 292 U.S. 143, 54 S.Ct. 634 78 L.Ed. 1178, 92 A.L.R. 928 (1934); *Holderness v.*

Hamilton Fire Ins. Co. of New York, S.D.Fla. 1944, 54 F.Supp. 145 . . ." (Emphasis supplied)

Thus, the failure of the Florida Supreme Court to allow an asserted defense, valid in the state where the contract was made and performed, to be utilized in the Courts of the State of Florida, flies in the face of all established precedents of the Courts of the United States, the State of New York and the State of Florida itself.

The State of New York has adopted the Seventh Amendment to the Constitution of the United States[2] as its law regarding the right to trial by jury.

"Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provisions shall remain inviolate forever; . . ." *Article I, Bill of Rights, Section 2, Constitution of the State of New York*.

This premise is further defined in the case of *Edward F. Fedoryszyn, v. Leonard Weiss and Fedoryszyn Associates*, 310 N.Y.S.2d 55, at 58, (1970), 62 Misc.2d 889, where, in a stockholders derivative action the Court said:

"The existence in the complaint of a request for equitable relief does not destroy the right to a trial by jury where judgment for a sum of money is sought (*Vinlis Construction Co., Inc., et al. v. Roreck*, 23 A.D.2d 895, 260 N.Y.S.2d 345). *The right to a jury trial preserved by Amendment Seven to the United States Constitution is guaranteed by our State's Constitution. (Article I, Section 2).*" (Emphasis supplied)

In *McKinney's Consolidated Laws of New York – Civil Practice Law & Rules*, Volume 7B, Rule 4101, providing for trial by jury, states:

"In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived . . .
1. an action in which a party demands and sets forth facts

[2]"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Constitution of the United States, Seventh Amendment*.

which would permit a judgment for a sum of money only: . . ."

See also *Ruth H. Davis, as Executrix of the Estate of Lucy H. Mackey, Deceased v. Prudential Insurance Company of America*, 297 N.Y.S.2d 261 (1969) 31 A.D.2d 865; and *Schenck v. Prudential Ins. Co.*, 3 N.Y.S.2d 856 (1938), 167 Misc. 282, where the Court said that the right to a jury trial is a substantial constitutional right not within the discretion of the judge.

This Court, in the case of *Beacon Theatres, Inc. v. Hon. Harry C. Westover*, 359 US at 501 (1958), granted certiorari because, as it stated:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick v. Schiedt*, 293 US 474, 486; 79 L.Ed 603, 611, 55 S.Ct. 296, 95 ALR 1150, 36 NCCA 184." (Emphasis supplied)

Inherent in the principle of law laid down by this Court in *Bradford Electric*, *supra*, is the rationale that protects a citizen from deprivation of his right of defense when a party brings an action against him in a state where the citizen's protection, under a contract, may not exist. The law is clear on this point and has been universally followed by the Federal Courts, The Florida Courts and the Courts of New York.

The factual situation in the case *sub judice*, aptly demonstrates the rationale of *Bradford Electric*, *supra*. There is a contract. There is no dispute that the contract was drafted, executed and performed in the State of New York. There was an action for enforcement of the contract brought in the State of Florida, which if successful, would result in a judgment for money only, and, there was asserted an affirmative defense in the action, which defense is valid under the laws of the State of New York. There could be no clearer picture of the facts and the law, as hereinbefore set forth, to illustrate to this Court the error committed by the Florida Supreme Court thereby denying the Petitioner equal protection and due process of law

guaranteed him under the Constitution of the United States.

The Panel of the Florida Supreme Court went even further in this case. Not only did the Court deprive the Petitioner of his Constitutional rights to assert a defense on the contract, but it conferred upon itself jurisdiction in circumstances where its jurisdiction was prohibited under Article V, Section 3(b)(3) of the Florida Constitution.

The attention of the Court is directed to the fact that the law applicable in the case *sub judice*, is the law of contracts governed by the Statutes of New York. This is the law in the Court below. That this is the law is not now, nor ever has it been in dispute. Irrespective of this fact, the Appellant below founded his claim of conflict on the cases of *Delves* and *Pitts*, *supra*, which cases construe the Integration Rule of the Florida Bar Association. These are administrative regulations which govern disciplinary proceedings, *quasi*-criminal in nature, having a right of appeal to the Florida Supreme Court. They are regulations which are relevant only to Florida proceedings. How then, can the Florida Supreme Court compare these administrative regulations to the Statutes of New York? The answer is obvious, they cannot and that, therefore, no conflict exists. The case *sub judice* is governed by statutory laws passed by the legislature of New York, not by Integration Regulations propounded by the Florida Supreme Court. To permit the Florida Supreme Court to place the Integration Regulations of the Florida Bar Association on a par with the Statutes of the State of New York in an effort to obtain jurisdiction in this cause is to make a mockery of the Constitution of the United States and the statutes of the State of New York.

Equally as important as the law and the facts set forth herein is consideration by this Court of the atmosphere surrounding certain members of the Florida Supreme Court. As a result of impeachment proceedings by the Select Committee on Impeachment of the House of Representatives of the State of Florida, and the testimony and exhibits developed at the hearings, two of the Justices who sat in determination of the cases below resigned from the Court and a third Justice was referred to the Judicial Qualifications Commission for a mental examination to determine his competency to continue on the Court.

Sworn testimony taken at the impeachment hearings, which hearings were subsequent to the final determination of this case, showed serious irregularities on the part of Justices concerned with this case (Appendix G, H, and I). Further investigations were being made as to such irregularities but resignations of the concerned Justices terminated the investigation and the Petitioner is left with circumstantial evidence as to irregularities occurring in the instant case.

It is neither a pleasant nor an easy task to challenge the motives and integrity of certain members of the Florida Supreme Court. However, a combination of events in the instant proceeding compels, reluctantly, the raising of these questions. Examination of that Court's actions in conferring upon itself jurisdiction where jurisdiction should have been declined; of the Court's failure to apply the established law to the facts of the case; and of the revelation of irregularities of proceedings in this cause adduced from testimony at the impeachment hearings: all point to the single conclusion that the Petitioner has been denied a fair and impartial hearing on appeal and has thus been denied his rights under the Constitution of the United States.

CONCLUSION

To summarize, the Court now has for consideration a case in which the Florida Supreme Court seized jurisdiction in a situation where it was powerless to grant certiorari under Article V, Section 3(b)(3) of the Constitution of the State of Florida, as amended.

Having erroneously granted itself power of review, the Court then, while proclaiming that the case was governed by the law of the State of New York, failed to give full faith and credit to the laws of that State by substituting itself for the jury below as the trier of facts and by denying the Petitioner the right to assert, as an affirmative defense, the defense of usury, rights guaranteed to the Petitioner under the New York law.

In so doing, the Florida Supreme Court has violated Petitioners rights under Articles One and Four of the Constitution of the United States and under Amendments Seven and Fourteen of said Constitution. For such reason, we respectfully

urge that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 70-2149 (Williams)

SAUL GOODMAN,	:	
Plaintiff,	:	*FINAL JUDGMENT*
vs.	:	*FOR DEFENDANT*
RICHARD H. OLSEN,	:	
Defendant.	:	

Pursuant to the verdict of the Jury rendered upon the trial of this action, it is

ORDERED and ADJUDGED that plaintiff, SAUL GOODMAN, take nothing by this action and that the defendant, RICHARD H. OLSEN, go hence without day and that he shall recover costs from the plaintiff, to be taxed at a later date by this Court.

DONE and ORDERED at Miami, Florida this 16th day of March, 1972.

Circuit Judge

APPENDIX B

Not final until time expires to file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972
FRIDAY, NOVEMBER 17, 1972

SAUL GOODMAN, **
Appellant, **
vs. ** CASE NO. 72-798
RICHARD H. OLSEN, **
Appellee. **

This cause having come on for hearing upon appellee's motion to dismiss appeal and appellant's motion to file appellant's brief, and the court having considered same, it is ordered that appellant's motion to file brief is denied, appellee's motion to dismiss is granted and this appeal from the Circuit Court of Dade County, Florida (#70-2149) be and the same is hereby dismissed.

A True Copy
ATTEST:

/s/ Clerk District Court of Appeal, Third District

cc: Prunty, Ross, DeLoach & Olsen
Ragano & LaPorte
Gene Williams
E. B. Leatherman
/h

APPENDIX C

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973

SAUL GOODMAN, :
Petitioner, :
v. : CASE NO. 43,168
RICHARD H. OLSEN, :
Respondent. :
:

Opinion filed May 9, 1973
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield; and Harold D. Lewis of Lewis & Lewis, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach & Olsen, for Respondent

McCAIN, J.

This cause is before us on petition for writ of certiorari to review an order of the District Court of Appeal, Third District, reported at 269 So. 2d 762, which conflicts with Hector Supply Co. v. Carter, 122 So. 2d 22 (Fla. App. 3rd, 1960). We have jurisdiction pursuant to Fla. Const., Article V, Section 3(b)(3) (1973).[1]

On June 23, 1972, the appellant (petitioner here and plaintiff in the trial court) filed his notice of appeal in the District Court of Appeal, Third District, from an adverse judgment of the Circuit Court of Dade County. Difficulties in the prosecution of the appeal arose when, on September 23, 1972, appellee filed his brief on the merits with the District Court prior to the submission of appellant's brief. At the time

1. Under the new Article V, this Court may review by certiorari any decision of a district court of appeal "that is in direct conflict with a decision of *any* district court of appeal or of the supreme court on the same question of law. . ." Fla. Const. Article V, Section 3(b)(3) (1973).

of filing his brief, however, appellee made no motion to dismiss the appeal for failure of appellant to submit a brief.

On October 19, 1972, appellee moved to dismiss because of appellant's failure to comply with Rule 3.7a, F.A.R. Thereupon, on November 2, 1972, appellant filed a motion for leave to file his brief and explain his delay with supporting affidavits. Both motions were heard by the Court on November 13, 1972, at which time appellant filed his brief at the Court's suggestion.

On November 17, 1972, the District Court entered its order denying appellant's motion for leave to file his brief and granted appellee's motion to dismiss. Certiorari to this Court followed.

In the case cited for conflict, *Hector Supply Co. v. Carter, supra*, appellant filed a brief which failed to conform to the requirements of Rule 3.7f(4), F.A.R. Subsequently, appellee filed his brief and in it also argued that the appeal should be dismissed because of appellant's failure to conform to the appellate rules. The District Court concluded that the motion to dismiss was untimely, observing:

> "... No motion was presented to this court to require the appellant to file a brief in conformity with the rules or suffer a dismissal of its appeal. The appellee chose to wait until the filing of his brief and therein argued that the appeal should be affirmed because of the violation of the rule. Such an objection is untimely."

A similar situation exists in the instant case. Sub judice, appellee filed his brief on September 23, 1972 but made no motion to dismiss until nearly a month later. In these circumstances, it is our judgment that the objection was untimely and that the District Court abused its discretion in dismissing the appeal.

Accordingly, certiorari is granted, the order of the District Court of Appeal, Third District, is quashed and the cause remanded to that Court with directions that the appeal be reinstated.

It is so ordered.

ERVIN, Acting Chief Justice, ADKINS and DEKLE, JJ., Concur

BOYD, J., Dissents

APPENDIX D

To file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1974

PAUL GOODMAN,	**	
Appellant,	**	
vs.	**	CASE NO. 72-798
RICHARD H. OLSEN,	**	
Appellee.	**	

Opinion filed March 12, 1974.

An Appeal from the Circuit Court for Dade County, Gene Williams, Judge.

Leo Greenfield, for appellant.

Prunty, Ross, DeLoach & Olsen, for appellee.

Before BARKDULL, C.J. and CARROLL and HENDRY, JJ.

PER CURIAM

Affirmed. See: Busser v. Sabatasso, Fla.App.1962, 143 So.2d 532; Sharp v. Dixon, Fla.App.1971, 252 So.2d 805; DeKerwin v. First National Bank of Chicago, N.D. Ill.1959, *170 F.Supp. 112*; Knickerbocker Life Insurance Co. v. Nelson, 1897, *78 N.Y. 137*; Breunich v. Weselman, 100 N.Y. 609, *2 N.E. 385*; U. T. Hungerford Brass & Copper Co. v. Brigham, 47 Misc.Rep. 240, *95 N.Y.S. 867*; Empire Trust Co. v. Coleman, 85 Misc.Rep. 312, *147 N.Y.S. 740*; Bishop v. Rider, 235 A.D. 736, *255 N.Y.S. 787*; In Re Grottola's Estate, Sup.Ct.1953, *124 N.Y.S.2d 85*; Moore v. Plaza Commercial Corp., 9 A.D.2d 223, *192 N.Y.S.2d 770*; Equitable Life Assurance Society of the United States v. Kerpel, 38 Misc.Rep.2d 856, *238 N.Y.S.2d 1016*.

APPENDIX E

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN,	:	
Petitioner,	:	
v.	:	CASE NO. 45,356
RICHARD H. OLSEN,	:	DCA CASE NO.
Respondent.	:	72-798
	:	

Opinion files November 7, 1974

Writ of Certiorari to the District Court of Appeal, Third District

Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner

John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he

would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had

been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin, supra.*

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000 was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather

from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur
OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX F

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1975
WEDNESDAY, JANUARY 29, 1975

SAUL GOODMAN,		
Petitioner,	**	CASE NO. 45,356
vs.	**	THIRD DISTRICT
RICHARD H. OLSEN,	**	COURT OF APPEAL,
Respondent.	**	72-798

On consideration of the Petition for Rehearing filed by attorneys for respondent and reply thereto,

IT IS ORDERED that said petition is denied.

ADKINS, C.J., ROBERTS and McCAIN, JJ., and ERVIN, Ret. J., concur
OVERTON, J., dissents

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

By: Kay O. Yent
Deputy Clerk

Y
CC: Hon. W. P. Carter, Clerk
Hon. Gene Williams, Judge
Hon. John W. Prunty
Law Offices of Leo Greenfield
Hon. Frank Ragano

APPENDIX G

AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF LEON)

Before me this day personally appeared MARC H. GLICK, who, being duly sworn, deposes and publishes this statement:

1. I am the permanent Staff Director of the Committee on Judiciary of the Florida House of Representatives. During the impeachment investigation of Florida Supreme Court Justices Dekle, Boyd and McCain, I served as Staff Director and Associate Counsel for the House Select Committee on Impeachment, House of Representatives, State of Florida.

2. In my capacity as Staff Director and Associate Counsel, I was charged with investigating the conduct of the aforesaid Justices, and have personal knowledge of same.

3. Justice McCain sought to have the investigation relating to him enjoined by petitioning, first the Florida Supreme Court, and when denied, the United States District Court where it was also denied.

4. Justice McCain, through his counsel, refused to testify or appear before the Impeachment Committee, invoking the Fifth Amendment of the Constitution of the United States.

5. As part of the investigation of the Justices, but in particular that of Justice McCain, the Committee examined the cases of LOMBARDOSI vs WAINWRIGHT, Case Nos. 41,001 and 41,001A, GOODMAN vs. OLSEN, Case Nos. 43,168 and 45,356. In these cases Justice McCain was the assigned Justice and Mr. Frank Ragano, an Attorney from Tampa, Florida, represented a litigant on one side or the other in each case.

6. In the LOMBARDOSI case it was testified that Justice McCain called his aide, Anne Parker, from Tampa, Florida, to ask her to search the court records and advise him of the disposition of the LOMBARDOSI matter. Parker testified she checked the court record, called Justice McCain in Tampa and informed him that the Court had denied the LOMBARDOSI petition for habeas corpus and had denied a petition for re-hearing on the matter and further that Justice McCain had

voted with the majority, four to three, in both instances recommending denial. Parker further testified that a few days later an amended habeas corpus petition was filed and Justice McCain changed his vote and voted in favor of granting it. This petition was numbered 41,001A and Mr. Ragano was representing Lombardosi.

7. The GOODMAN vs. OLSEN cases were investigated to examine the irregularities which appear in the Supreme Court confidential records relating to the assignment of justices and the handling of procedures in the case. They were further used in developing the relationship between Appellant Goodman's Attorney, Frank Ragano, and Justice McCain.

8. The Supreme Court confidential records in the aforesaid cases became a matter of public record through the testimony of Sid White, Clerk of the Supreme Court, on April 16, 1975, and were marked Exhibit No. 10.

9. In case No. 43,168 the records show the case had been originally assigned to Justice Ervin. For reasons unknown and not part of the record, the case was reassigned to Justice McCain. The record contained a document on DETERMINATION OF JURISDICTION CERTIORARI – DCA 3, which set forth the facts and law of the case and recommended denying the Writ of Certiorari. A line was drawn through the pages of this document.

Further, in the record, there appeared another document entitled DETERMINATION OF JURISDICTION ON RE-ASSIGNMENT. This document recommended the granting of the Writ of Certiorari without oral argument and was dictated by Justice McCain.

The record indicates Certiorari was granted without oral argument, Appellant's appeal was reinstated and remanded to the District Court of Appeal, Third District, for further proceedings.

10. Case No. 45,356 was also assigned to Justice McCain. This is the same GOODMAN – OLSEN case appealed the second time. Although the court records reflect Leo Greenfield to be the Attorney for the Appellant, the Court files contain pleadings with Frank Ragano's name as co-counsel for Appellant.

11. The assignment of cases to Justices of the Florida Supreme Court is done on a random selection basis as per the Court rules and is assigned after each case matures. Each Justice should get every seventh case. Justice McCain gained control over the first GOODMAN – OLSEN case by reassignment from another Justice which is an unusual and irregular procedure. I had not completed investigation of how Justice McCain gained control of the second case prior to his resignation from the Court.

12. There is in the record of the impeachment proceedings the uncontroverted testimony of Sid White, Clerk of the Florida Supreme Court, that Justice McCain requested the assignment of several cases to him, that he could not recall all of the requests or if the GOODMAN - OLSEN case had been requested. Further, he testified that requests for assignment of cases by Justices were uncommon and unusual.

13. On April 24, 1975, the Select Committee on Impeachment voted unanimously to recommend the impeachment of Justice McCain to the full House of Representatives and the Committee instructed the staff to draft Articles of Impeachment based on misfeasance, malfeasance and misdemeanor in office including but not limited to the following:

a. That Justice McCain used his judicial office to influence the outcome of decisions of the Supreme Court and other Courts of the State of Florida.

b. That Justice McCain solicited and received monies as and for campaign contributions or other unlawful compensation in violation of the laws of the State of Florida or of the judicial canons of ethics.

c. That Justice McCain showed bias and favoritism toward certain attorneys and certain litigants appearing before the Supreme Court and that he exploited his judicial office to render decisions or awards to the prejudice of the courts in violation of judicial canons of ethics and/or laws of Florida.

d. That Justice McCain has brought disgrace, disrepute and and damaged and jeopardized the image and reputation and independence and integrity of the Supreme Court of Florida and of the entire judicial system.

14. Upon the direction of the Committee, the staff

commenced the preparation of the Articles of Impeachment on Justice McCain for presentation to the House of Representatives of the State of Florida. Attached please find the first draft of the Articles of Impeachment against Justice McCain which were not acted upon nor released because of his resignation.

15. On April 28, 1975, Justice McCain submitted his resignation from the Supreme Court of Florida, which resignation was accepted by Governor Askew.

16. The resignation of Justice McCain ended the authority of the Select Committee on Impeachment and precluded further investigation into the GOODMAN – OLSEN cases.

17. Prior to the resignation of Justice McCain, Justice Dekle resigned. Further, the Committee, by a vote of 4 to 1 voted not to impeach Justice Boyd, but to refer him to the Florida Judicial Qualifications Commission for a mental examination and determination of capacity to continue to serve in office.

18. Further, Affiant sayeth not.

/s/MARC H. GLICK

Sworn to and subscribed before me this 29 day of May, 1975.

/s/ Dorothy R. Carroll
Notary Public
State of Florida at Large

My Commission Expires Sept. 12, 1975.

ARTICLES OF IMPEACHMENT
H. R. NO. _____
Select Committee on Impeachment

A RESOLUTION OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA PREFERRING ARTICLES OF IMPEACHMENT AGAINST DAVIS L. McCAIN AS A DULY COMMISSIONED AND ACTING JUSTICE OF THE SUPREME COURT OF THE STATE OF FLORIDA; PROVIDING FOR THE PRESENTATION OF ARTICLES OF IMPEACHMENT TO THE SENATE

OF THE STATE OF FLORIDA; REQUESTING THE TRIAL THEREOF; APPOINTING A COMMITTEE OF THE HOUSE TO MANAGE, PRESENT AND PROSECUTE ARTICLES OF IMPEACHMENT AT TRIAL BEFORE THE SENATE WITH OR THROUGH COUNSEL; AND PROVIDING FOR THE USE OF STAFF, THE EMPLOYMENT AND COMPENSATION OF LEGAL COUNSEL, CLERICAL HELP, INVESTIGATIVE PERSONNEL, OTHER EXPENSES OF CASE PREPARATION, TRIAL, SUBPOENAE AND COMPENSATION OF WITNESSES.

WHEREAS, a committee of this body of the 1975 Legislative Session, was appointed on February 10, 1975, by the Speaker of the House of Representatives to investigate charges of official misconduct of Justice David L. McCain of the Florida Supreme Court and make its report and recommendations to the House of Representatives, and

WHEREAS, said committee has performed its duties and by these articles files its report recommending that said justice be impeached, removed from office and disqualified from holding any office of honor, trust, or profit, NOW THEREFORE,

Be it Resolved by the House of Representatives of the State of Florida:

SECTION 1. That David L. McCain, a duly commissioned and acting justice of the Supreme Court of the State of Florida has been guilty of misdemeanor in office as a judicial officer of the State of Florida for which he, David L. McCain as Supreme Court Justice, should be and is hereby impeached of his office under Article III, Section 17, Constitution of the State of Florida; the acts so constituting misdemeanor in office of him, David L. McCain, as a judicial officer, being hereinafter more particularly set forth by way of separate articles of impeachment which are hereby found and voted against David L. McCain as a justice of the Supreme Court of the State of Florida by a vote of two-thirds (2/3) of all members present of the House of Representatives of the State of Florida, viz:

ARTICLES OF IMPEACHMENT

Articles of impeachment of the House of Representatives of the State of Florida in the name of themselves and all of the people of the State of Florida against David L. McCain who was heretofore elected, duly qualified, and commissioned to serve as a justice of the Supreme Court of the State of Florida.

ARTICLE I

Interference

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain, in violation of his constitutional oath to faithfully perform the duties as a judicial officer of the State of Florida and in violation of the laws of the State of Florida, or, in the alternative, of the code of judicial conduct and its predecessor the Cannons of Judicial Ethics, did on one or more occasions engage in conduct impairing and obstructing the proper administration of justice through attempts to improperly influence or subvert the outcome of decisions of cases pending in the courts of this state in favor of attorneys or litigants.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE II

Favoritism and Partiality

Using the power and authority of office while serving as a judicial officer of the Courts of the State of Florida, David L. McCain, in violation of his constitutional oath to faithfully perform the duties of a judicial officer of the State of Florida, and in violation of the laws of the State of Florida, or, in the alternative, the code of judicial conduct and its predecessor the Cannons of Judicial Ethics, has on one or more occasions shown bias, favoritism and partiality toward certain attorneys and certain litigants appearing in courts on which he was a judicial officer and thereby allowing such bias, favoritism, and partiality to significantly influence his decisions and judgments.

WHEREFORE, David L. McCain, by such conduct is guilty

of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE III

Unlawful Compensation

While serving as a judicial officer of the State of Florida, David L. McCain, personally, or in the alternative, by an agent acting in his behalf, did solicit and exact or, in the alternative, accept compensation other than that provided by law from one or more individuals, each such individuals being a litigant to a case that David L. McCain did, in his official capacity as a judicial officer of the State of Florida, make a judgment favorable to such party or parties.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE IV

Failure to Recuse

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain heard, considered and decided litigation in which he had an immediate interest and in which the outcome would have a direct effect on him.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE V

Campaign Contributions

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain solicited campaign contributions from litigants and attorneys at the bar, who further were engaged in pending litigation before his court contrary to and in violation of the code of judicial conduct, and its predecessor the Cannons of Judicial Ethics.

WHEREFORE, David L. McCain, by such conduct in guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE VI

Financial Transactions

While a judicial officer of the State of Florida, David L. McCain did place himself in a compromising position and entered into financial and business transactions which could reflect adversely on his impartiality, interfere with the proper performance of his duties and involved him with attorneys and persons with pending litigation before the courts on which he served contrary to and in violation of the code of judicial conduct, and its predecessor the Cannons of Judicial Ethics.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE VII

Lowering the Esteem of the Judiciary

In his conduct as a judicial officer of the State of Florida, David L. McCain has by his infamy and the reasonable and probable consequences of the acts or conduct enumerated in Articles I through VI debased and degraded the office in which he serves and the court on which he sits into disrespect, scandal, disgrace, discredit, disrepute, and reproach to the prejudice of public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the integrity and impartiality of the State Judiciary placing a stigma thereon and rendering him unfit to continue to serve as a judge or public officer.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust or profit.

SECTION 2. That David L. McCain, as a Justice of the

Supreme Court of the State of Florida, be impeached of his office for misdemeanor in office.

SECTION 3. That the Speaker of the House of Representatives of the State of Florida shall appoint two (2) members of the House of Representatives as a House committee of managers. The Committee shall be known as: "The House Committee of Managers: Senate Impeachment Trial of Justice David L. McCain."

SECTION 4. That the House committee of managers be and they are hereby instructed to appear before the Senate of the State of Florida and at the bar thereof in the name of the House of Representatives, and all of the people of the State of Florida, to impeach David L. McCain for misdemeanor in office and to exhibit to the Senate the foregoing articles of impeachment against justice David L. McCain which have been agreed upon by this House and that the House committee of managers request that the Senate issue an Order for the appearance of David L. McCain before the Senate to answer to the articles of impeachment and demand his impeachment, conviction, removal from office, and disqualification to hold any office of honor, trust, or profit. And that it further request that the impeachment trial be open to the public and all media in the interest of respect for and trust in government and the people of the State of Florida.

SECTION 5. That the House committee of managers shall manage, present and prosecute, with or through counsel, the foregoing articles of impeachment at the trial thereof by the Senate.

SECTION 6. That the House committee of managers on the part of the House of Representatives of the State of Florida is hereby authorized and empowered to use staff, employ and fix compensation of legal counsel, clerical, investigative and other necessary assistance as they may require, and to incur such expenses as may be necessary in the preparation and conduct of the case to be paid out of the legislative expenses on vouchers approved by the House committee of managers.

SECTION 7. That the House committee of managers be and is hereby authorized to issue subpoenae and subpoenae duces tecum requiring appearance of witnesses and production

of documents in further preparation, and for the impeachment trial; such witnesses to receive compensation as provided by law.

APPENDIX H

SUPREME COURT
OF FLORIDA
Progress Docket

GOODMAN, SAUL
KEY NAME 43168
CASE NO
CERT. THIRD DCA DADE COUNTY
JURISDICTION
DEC. 18, 1972
DATE FILED
Opinion - 5/9/73
6-26-73 pet. for reh. denied

ATTORNEYS
Frank Ragano, Miami

ATTORNEYS
Messrs. Prunty, Ross, DeLoach and Olsen, Miami

PARTIES
SAUL GOODMAN,
Petitioner,
vs
RICHARD H. OLSEN,
Respondent.

DETERMINATION OF JURISDICTION - ORAL ARGUMENT

JUSTICE	DATE
F	JAN 9 1973
SCA	JAN 10 1973
B	JAN 12 1973
McC	JAN 30 1973 FEB 5 1973
HSD	
C	FEB 1 1973

DISPOSITION FEB 26 1973 To set w/o

ORAL ARGUMENT Set oral arg. for 3-5-73

JUSTICE	DATE
McC	APR 10 1973
F	MAY 1 1973
SCA	APR 30 1973
B	MAY 4 1973
HSD	MAY 7 1973
	To Bill Stamp 5-9-73

DISPOSITION

MOTION

JUSTICE	DATE

DISPOSITION

REHEARING 5-23-73

JUSTICE	DATE
McC	JUN 1 1973
C	JUN 11 1973
	JUN 22 1973
HSD	JUN 15 1973
B	JUN 4 1973
	Delay 6-22-73

DISPOSITION

JUSTICE	DATE
F	FEB 13 1973
SCA	FEB 19 1973
B	FEB 20 1973
McC	
HSD	FEB 15 1973

JUSTICE	DATE

DISPOSITION

DAY	MO	YEAR	ENTRIES
			Jur. fee paid
12	18	72	Petition for Writ of Certiorari
"	"	"	Petitioner's Brief & Appx
"	"	"	Transcript of Testimony Vols. I, II
"	"	"	Certified copies of Appeal Papers
Nov.	2	1973	Brief of Respondent
Nov.	2	1973	Letter of Jon W. Prunty, dated 12-29-72
Jan	8	"	Motion for Leave of Court to File Amended Petition for Writ
"	"	"	Amendment to Petition
"	"	"	Reply Brief in Support of Petition
Jan	26	"	Respondent's Supplemental Brief, etc. (DCA)
Jan	5	73	Order allowing Certiorari and Dispensing with oral argument - per cur.
3	19	73	Brief of Petitioner w/Appendix
3	23	73	Req. for oral argument
3	29	73	Respondent's brief & appendix
3	30	73	Supp. record
4	6	73	Reply Brief of Petitioner
May	9	73	Opinion (Mandate) Order of DCA quashed & cause remanded to DCA "directing that appeal be reinstated."
5	23	73	Petition for Rehearing
6	26	73	denied - mandate issued
			Respondent's motion to recall mandate

CASE NO. 43,168

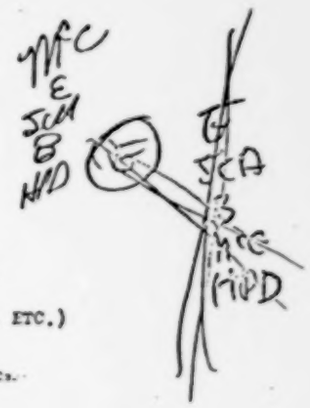
GOODMAN, SAUL,

Petitioner,

vs.

OLSEN, RICHARD H.,

Respondent.



REMARKS

(MOTIONS, PETITIONS, ETC.)

PETITION FOR REHEARING

Grant	Deny
B	

SAUL GOODMAN, petitioner,

v.

RICHARD H. OLSEN, respondent

CASE NO. 43,168

REMARKS

(ANY QUESTIONS, PLEASE STATE THEM.)

NOTE TO JUSTICES: It will be appreciated if each of the Justices will use this facing sheet, instead of the facing sheet of the attached opinion, to indicate his remarks or views he may have with respect to the opinion.

FOR FILING STAMP

FILE

MAY 9 1973

CHIEF JUSTICE

Use page attached, if necessary.

DETERMINATION OF JURISDICTION
CERTIORARI - DCA 3

SAUL GOODMAN -vs- RICHARD H. OLSEN No. 43,168

STATUS: Petition for writ of certiorari to DCA 3.

FACTS: On June 23, 1972, the Petitioner (plaintiff below) filed an appeal from the 11th Judicial Circuit Court orders dated March 16 and May 31, 1972.

On Sept. 28, 1972 the Respondent filed his brief on the merits of the appeal. On Oct. 19, 1972 the Respondent filed a motion to dismiss the appeal, arguing that the Petitioner had not filed his brief within the time allowed by the Appellate Rules.

On Nov. 2, 1972 the Petitioner filed a "Motion for Leave of Court to File Appellant's Brief" wherein he explained his delay in filing a brief and attaching an affidavit executed by his secretary. On Nov. 13 1972 oral argument was heard on this motion and Petitioner filed his brief as of that date.

On Nov. 17, 1972 the DCA 3 entered its order denying Petitioner's motion and granting Respondent's motion dismissing the appeal. It is from this order that Petitioner files his petition for writ of certiora

ISSUE: Whether Petitioner's allegation of conflict between the DCA 3 decision below and Hector Supply Co. Inc. v. Carter, 122 So.2d 22 3dDCA 1966, is a relevant consideration when the petition is presented under Art. V, Sect. 4, Fla. Const.

DISCUSSION: Art. V, Sect. 4, of the Fla. Const. provides in part:

> "The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, . . ."

Since Petitioner is alleging conflict between two DCA decisions, no jurisdiction can rest with this court under the petition as presented.

In his brief, Petitioner also cites Baker-Lewis Construction Co. v. Midyette, 141 So. 534, Fla. 1932, for the proposition that by failing grant Petitioner's motion, the DCA 3 abused its discretion. The facts

...1

in Baker reveal ". . . a course of indulgence between counsel as to the filing of briefs . . ." together with a voluntary stipulation as to the time when the opposing party's brief could be timely filed. In Baker, counsel met that stipulated deadline.

There is no conflict with Baker since there was no "course of indulgence" here and no adhered to stipulation between counsel as to timely filing.

RECOMMENDATION: Deny.

/c

...2

DETERMINATION OF JURISDICTION
ON REASSIGNMENT
FEBRUARY 5, 1973

STYLE: Goodman v. Olsen 843,168

STATUS: Conflict certiorari to DCA-3

FACTS: This involves a procedural matter and apparent conflict with decisions within the DCA-3, which by construction of new Article V, we have agreed is reviewable if there is conflict. (The petition was before us on effective date of Article V.)

Petitioner filed a timely notice of appeal with DCA-3 on June 23, 1972. Petitioner then failed to file a brief. On Sept. 20, respondent filed his brief on the merits, and on Oct. 19 filed a motion to dismiss. On Nov. 2 petitioner filed a motion for leave to file and explained his delay with supporting affidavits. On Nov. 13 oral argument before the DCA was held upon the motion. Petitioner filed his brief, at the court's suggestion on that date. On Nov. 17 the DCA denied petitioner's motion and granted respondent's motion to dismiss.

Conflict certiorari to us followed.

In Hector Supply Co. v. Carter, Fla. App. 1960, 122 So. 2d 22, (also a DCA-3), the appellant did not file his brief in conformity with the rules. Appellee filed his brief and in it also argued that the appeal should be dismissed. The DCA then ruled that since the appellee filed his brief first (not choosing to first file a motion to dismiss) then appellee's argument was untimely and the issues on appeal would be heard even though appellant had not filed a supporting brief.

Thus, the rationale of Hector gives us conflict. In both cases, appellants did not file briefs (sub judice, appellant did later file a brief), and in both cases the appellees filed briefs on the merits. In Hector, the appellee raised the issue of dismissal in his brief on the merits, whereas, sub judice it was raised by separate motion subsequent to appellee's filing of brief. This makes the case under review even stronger for conflict.

RECOMMENDATION: Grant certiorari and waive oral argument. The record is simple.*

* Without attempting to go to the merits, the record proper indicates a fairly strong case for petitioner, i.e. (1) no showing of prejudice to respondent due to petitioner's tardiness in filing brief, (2) internal mix-up between lawyers, and (3) brief was finally filed by petitioner.

DLS:w

APPENDIX I

SUPREME COURT
OF FLORIDA
Progress Docket

CONFIDENTIAL

Key Name
Case No. 45356

CERT. DCA-3 DADE COUNTY
Jurisdiction

APRIL 10, 1974
Date Filed

11-7-74 Opinion
Disposition

12-9-74
Petition for Rehearing Filed

1-29-75 denied
Disposition

ATTORNEYS
LEO GREENFIELD - North Miami

ATTORNEYS
PRUNTY, ROSS, DeLOACH & OLSEN
Miami

Parties
SAUL GOODMAN,
Petitioner,
vs
RICHARD H. OLSEN,
Respondent.

DETERMINATION OF JURISDICTION - ORAL ARGUMENT

JUSTICE	DATE
MEC	MAY 23 1974
NPD	
O	JUN 5 1974
SCA	JUN 12 1974
R	MAY 28 1974

MOTION

JUSTICE	DATE

ORAL ARGUMENT 9-13-74

JUSTICE	DATE
R	SEP 25 1974
C	OCT 4 1974
D	NOV 6 1974
MEC	9-16-74
BFO	OCT 7 1974

DATE FILED Month	Day	Year	ENTRIES 50759
4	10	74	Petition & attach.
	"		Transcript of Record
	"		Briefs
4	22	74	Respondent's Brief
	22		Transcript of Record
6	24	74	Certiorari Granted
7	19	74	Petitioner's Briefs on merits
7	22	74	Request for oral arg. on merits of Pet. application for writ
8	2	74	Certified Copies of Appeal Papers
8	2	74	Record (4 vols) & Exhibits
8	2	74	Resp. Briefs on the Merits
8	9	74	Reply Briefs on the Merits
11	7	74	Opinion (McCain) Cause reversed and rem for new trial.
11	14	74	Motion for ext. to file Pet. for Rehearing to and including 12-9-74 NFE (Resp
12	1	74	Petition for Rehearing
	"		Motion for Hearing En Banc
	"		Request for Oral Argument
12	16	74	Motion to Strike Request for Oral Argument and Motion for Hearing En Banc
	"		Reply to Petition for Rehearing
1	29	75	Pet. for reh. denied
3	6	75	Petition to stay Order, w affidavit in support
3	6	75	Order granting petition to stay to & including March 24, 1975 - further stay to be obtained from U.S. Supreme Court.

STYLE: SAUL GOODMAN v. RICHARD H. OLSEN

CASE NO: 45,356

REMARKS

NOTE TO JUSTICES: It will be appreciated if each of the Justices will use the listing sheet, instead of the attached opinion, to indicate his vote and any remarks or views he may have with respect to the opinion.

MAJORITY OPINION BY: McCain, J.

Concur	Dissent
R E B JCA	R - attached

PETITION FOR REHEARING

Grant	Deny
Q	Rec'd - Nov 7 1974 JCA

CASE NO. 45,356

SAUL GOODMAN,

Petitioner,

vs.

RICHARD H. OLSEN,

Respondent.

REMARKS

(MOTIONS, PETITIONS, ETC.)

PETITION FOR WRIT OF CERTIORARI

15" pen and

Grant	Deny
With Arg. / Without Arg.	

DETERMINATION OF JURISDICTION
CERTIORARI

STYLE: SAUL GOODMAN v. RICHARD H. OLSEN
Case No. 45,356

STATUS: Petition for writ of certiorari to the District Court of Appeal, Third District. 291 So.2d 71.

FACTS: On September 17, 1968, Goodman and Olsen entered into an investment contract related to a business venture. Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed to put up $300,000 of which Olsen would borrow $150,000, the total to be used to purchase 50,000 shares of Omega Equities, Incorporated. Each party was to own 25,000 shares, with Olsen's 25,000 shares pledged as collateral on the $150,000 loan from Goodman.

In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

Olsen also agreed not to sell any of his shares prior to December 31, 1969, without Goodman's prior written consent unless all of his obligation to Goodman in the venture were satisfied. Further, Olsen agreed to take out a $400,000 life insurance policy payable to Goodman, with Olsen paying the premiums, such policy to remain in good standing until the conclusion of the agreement.

The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration, at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

On September 18, 1968, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000. Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman. Olsen failed to repay the balance due on the $150,000 loan when due on May 13, 1969, and failed to buy back the Omega shares pursuant to the contract.

Petitioner commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1968, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his Answer the affirmative defense of usury. After a jury trial, petitioner moved for directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from whom he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the lender. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed Motion for Judgment in Accordance with Motion for Directed Verdict; or in the Alternative, For A New Trial, both of which motions were denied by the trial court.

On appeal, the Third District Court affirmed per curiam with a series of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In State of Florida, Ex Rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla.1963) and The Florida Bar v. Pitts, 219 So.2d 427 (Fla.1969), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

DISCUSSION: In the Delves case, involving a disciplinary proceeding, this Court held that the conduct of an attorney in furnishing a defective instrument to laymen from whom the attorney obtained a substantial loan and in thereafter filing his affidavit in a suit by laymen to enforce the note, charging that the note was usurious and at least partially unenforceable, warranted suspension. Delves had raised the affirmative defense of usury when suit was filed to enforce payment of the note. In deciding to increase the punishment of reprimand ordered by the Board of Governors of the Florida Bar to a twelve month suspension, the court quoted from the judgment:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be the condition to reinstatement. The Delves case was cited with approval in Pitts, supra.

Petitioner contends that the principle laid down in Delves and supported by the Pitts case estops the attorney-defendant being sued on a note from claiming usury as a defense as a matter of law; and further, that in the event such litigation reached a jury, it should be on appropriate instructions that the principle in the Delves case was in fact the controlling law.

Respondent contends that both Delves, supra, and Pitts, supra, are wholly and completely involved in a consideration and interpretation of the Integration Rule of the Florida Bar and have not the remotest relation to or similarity with any of the issues present in the case sub judice.

RECOMMENDATION: Grant Cert. Olsen, the respondent is a practicing attorney and the rationale of the foregoing cases clearly apply and justice requires evidence by the jury in usurious, contracts, etc.
Mac

ORAL ARGUMENT
FRIDAY, SEPTEMBER 13, 1974
FIVE BAR COURT
MAXIMUM OF FIFTEEN MINUTES TO THE SIDE

CASE NO. 45,356

SAUL GOODMAN,
Petitioner,
vs.
RICHARD H. OLSEN,
Respondent.

PRE-ARGUMENT ASSIGNMENT

mac

ORAL ARGUMENT
FRIDAY, SEPTEMBER 13, 1974
FIVE MAN COURT

STYLE: Saul Goodman v. Richard H. Olsen
Case No. 45,356

STATUS: Petition for writ of certiorari having been granted to the District Court of Appeal, Third District. 291 So. 2d 71.

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In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

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The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

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Goodman commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1968, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his answer the affirmative defense of usury. After a jury trial, petitioner moved for a directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from who he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the lawyer. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed a motion for judgment in accordance with motion for directed verdict; or in the alternative, for a new trial, both of which motions were denied by the trial court.

On appeal, the Third District Court affirmed per curiam [illegible]

of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In Re: Florida, Ex Rel. The Florida Bar v. Belves, 160 So.2d 114 (Fla.1964) and The Florida Bar v. Pitts, 210 So.2d 227 (Fla.1968), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

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> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate, and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be a condition to reinstatement. The Belves case was cited with approval in Pitts, supra.

Petitioner contends that the principle laid down in Belves and supported by the Pitts case extends the rule beyond being used on a note from client by way of a defense to an action of law and suit, to that in the event such litigation is [illegible] it should be an appropriate instruction that the principle in the [illegible] case was in fact the controlling law.

Respondent contends that both Belves, supra, and Pitts, supra, are wholly and completely involved with the [illegible] and interpretation of the Integration Rule of the Florida Bar and not the [illegible] relation to or similarity with any of the issues [illegible] in the case [illegible] supra.

DECISION: Withheld pending oral argument.

The jury [illegible]

DETAILS:

Supreme Court, U. S.
FILED
JUL 24 1975
MICHAEL RODAK, JR., CLERK

THE

Supreme Court of the United States

October Term, 1975

No. 74-1610

RICHARD H. OLSEN,

Petitioner.

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorney for Respondent
1680 N.E. 135th Street
North Miami, Florida 33181

FLORIDA FINANCIAL PRINTING, INC. 758-1782

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THE

Supreme Court of the United States

October Term, 1975

No.

RICHARD H. OLSEN,

Petitioner,

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent prays that the Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Florida entered on the 7th day of November, 1974, and an Order Denying Petition for Rehearing on January 29, 1975, be denied, and that said Petition for Writ of Certiorari be dismissed, forthwith.

INTRODUCTION

Respondent, being dissatisfied with the presentation by the Petitioner due to inaccuracies or omissions, has deemed it necessary to restate, pursuant to the provisions of Rule 40, portions of Petitioner's Petition for Writ of Certiorari, identified as:

OPINIONS BELOW;
JURISDICTION;
THE QUESTIONS PRESENTED; and
THE STATEMENT OF THE CASE.

Additionally, the Petition contains certain irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida.

For the foregoing reason, as well as others herein demonstrated, the Petition should be disregarded and stricken by the Court.

The most flagrant of the material, *de hors* the record, is the Affidavit of Marc H. Glick, a Staff Committee Investigator in recent Legislative Impeachment Committee hearings in Florida, which is intended to indicate irregularity in the assignment of cases in the Florida Supreme Court, and inferring that the same may have happened in the instant cause. As pointed out, inasmuch as the Petition is, in good part, based on materials, *de hors* the record, it should be stricken forthwith. Nevertheless, in the interests of justice, and in order that this Honorable Court may be advised as to the full truth of the testimony of Mr. Ragano before Mr. Glick, instead of a distorted version thereof contained

in Mr. Glick's Affidavit, the Affidavit of Frank Ragano, *de hors* the record, in response to and in clarification of, the Affidavit of Marc H. Glick, is printed herein as Appendix "E". Respondent submits to the Court that both Affidavits should be stricken by the Court, as well as the Petition herein; but in the interests of justice, provides the same in support of the integrity of the Supreme Court of Florida. Within the framework of the instant cause, there is no one save the Respondent to speak in support of the Highest Court of our State, and Respondent accepts the honor.

OPINIONS BELOW

In addition to the opinions appended to the Petition herein, Respondent has appended the Order of the Supreme Court of Florida, printed as Appendix "B" hereto, dated June 24, 1974, granting conditional Writ of Certiorari.

Additionally, the Opinion of the Supreme Court of Florida, dated November 7, 1974, on the merits of the cause after granting certiorari, reversing the District Court of Appeal of Florida, Third District, reported at 305 So.2d 753, is printed as Appendix "C" hereto. This Opinion is appended to the Petition herein; but inasmuch as the contents thereof are frequently referred to in this Brief, it is printed for the Court's easy literary reference.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, United States Code, Section 2101(c). Said Section contains no matters which pertain to the jurisdiction of this Court or the grounds upon which it may be invoked; and consequently, no fair claim for the invoking of jurisdiction is presented to this Honorable Court. Respondent is not fairly advised under what provision of the United States Code jurisdiction is claimed for this Petition, and must contest jurisdiction on all grounds. Certainly, the provisions of Title 28, United States Code, Section 2101(c), confer no jurisdiction on this Court to review the Judgment in question by Writ of Certiorari.

Jurisdiction of this Court herein is denied on a variety of grounds set forth in detail in the Argument portion of this Brief, entitled "REASONS FOR NOT GRANTING THE WRIT".

A capsulization thereof, at this juncture, would be useful to the Court.

A. The Judgment of the Supreme Court of Florida, entered on November 7, 1974, sought to be herein reviewed, was not a Final Judgment, and remanded the cause to the Circuit Court of Dade County, Florida, for trial.

B. No substantial Federal question is raised by the Petition.

C. The conflicts now claimed by the Petitioner with the Constitution of the United States were never

raised in any stage of the Florida proceedings, including the Petition for Rehearing before the Supreme Court of Florida, denied on January 29, 1975, and are raised for the first time in this Petition.

D. The Petition is based on matters, *de hors* the record, before the Supreme Court of Florida, and thus should not be considered.

E. The Petition is replete with irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida. The Petition should thus be stricken.

QUESTIONS PRESENTED

The questions presented by Petitioner herein raise no substantial Federal question. The questions, as presented by the Petitioner, will be discussed, *infra*, in detail, in the Argument Section of this Brief, but the Response thereto can be capsulized for the easy reference of the Court, as follows:

1. Petitioner disagrees with the Decision of the Supreme Court of Florida, assuming jurisdiction of your Respondent's Petition for Writ of Certiorari, under Article V, Section 3(b)(3), of the Constitution of the State of Florida, and contends that no conflict jurisdiction existed, and that the Supreme Court of Florida's Decision denies Petitioner due process. The construction of the State's own Constitution by its Supreme Court is uniquely within the province of that State's Supreme Court, and will be recognized and followed by the Supreme Court of the United States, and raises no substantial Federal grounds for invoking certiorari.

2. The second question raised by Petitioner claims, by reason of the Decision of the Supreme Court of Florida in the instant cause, conflict with Articles I, IV, VII and XIV of the Constitution of the United States. In essence, however, this question contends that the Supreme Court of Florida failed to give full satisfaction and credit to the Statutes of New York, and the Decisions of New York Courts on usury and on contracts. The opinion of the Supreme Court of Florida, entered on November 7, 1974, in and of itself, shows clearly that that Court did indeed give full faith and credit to the laws of New York concerning usury and contracts, but simply applied the New York law governing usury and contract in a manner of which the Petitioner disapproves and finds erroneous. In short, it is the construction of the New York law by the Supreme Court of Florida, of which the Respondent really complains, and which Petitioner attempts to clothe in a Federal jacket. Whether or not the construction of the New York usury law by the Supreme Court of Florida in the case at bar was or was not correct; it did, in fact, give full faith and credit not just to the Statutes, but to the judicial decisions of that State; and thus, no grounds exist for invoking the jurisdiction of this Court for certiorari.

STATEMENT

I. NATURE OF THE CASE

This Petition arises from an Order of the Supreme Court of Florida of November 7, 1974, granting Petition for Certiorari to Saul Goodman, reversing an Affirmance by the District Court of Appeal of Florida, Third District, which affirmed a Judgment of the Circuit

Court of Dade County, Florida, in favor of the Petitioner, Richard H. Olsen, and remanding the cause for a new trial. The aforesaid Order of the Supreme Court of Florida of November 7, 1974, does not constitute a "Final Judgment", which, under Title 28, United States Code, may be reviewed by the Supreme Court of the United States by Writ of Certiorari.

II. PERSONS INVOLVED

THE PETITIONER: Richard H. Olsen, is a member of the Florida Bar since 1957, a specialist in corporate acquisitions, both in New York and Florida, and an investor in numerous corporate stock acquisitions with special expertise therein. Since 1960, Olsen and the Respondent, Saul Goodman, a much older man, had a continuing quite close social friendship. Although Olsen never professionally represented Goodman, he did, over the course of years, give Goodman various legal opinions. Their relationship was quite close, and Goodman relied on him.

THE RESPONDENT: Saul Goodman, is sixty-seven (67) years old, a businessman long since retired (1958), unmarried and alone. Formerly, Goodman was an occasional investor who had several transactions with Olsen in the past.

III. THE CASE

This cause involved an action at law on a joint venture pursuant to a contract, hand-written by Olsen, an attorney, and dated September 17, 1968 (APP.A). Under the terms of the joint venture, Goodman (Plaintiff below and Respondent here), advanced the sum of

$300,000.00 for the purchase of 50,000 shares of Omega Equities, Inc. common stock under an investment letter. Of the $300,000.00 advanced by Goodman under the joint venture, $150,000.00 was a loan to Olsen with which he was to purchase 25,000 shares of the 50,000 shares to be purchased. Goodman would purchase the other 25,000 shares with the remaining $150,000.00 of the funds being advanced.

The contract written by Olsen further provided that Olsen would repay the $150,000.00 on or before May 31, 1969, *with no interest*. Olsen further agreed that if Goodman wished to sell his 25,000 shares between October 1, 1969, and December 31, 1969, that Olsen would repurchase the same for $10.00 per share. Thereafter, Goodman delivered a check to Olsen for $300,000.00, which was subsequently delivered to Omega in exchange for the purchase of the stock in question.

After maturity of the note, Olsen repaid $60,000.00 of the $150,000.00 loan, but failed to make further payments. As a result, Goodman filed suit in the Circuit Court of Dade County, Florida, for repayment of the balance due, and for damages incurred by Goodman when Olsen failed to comply with the terms of the contract and declined to buy back the stock from Goodman. The principal defense interposed by Olsen was that the contract was usurious under the Laws of the State of New York, and unenforceable. Olsen made this contention, although he, himself an attorney, had drawn the agreement and had obtained as a result thereof, $150,000.00 from Goodman, his old friend, a non-attorney, who had relied upon him. It was conceded by the parties that the transaction occurred in New York, and that New York Law should apply.

After a two (2) day trial, a verdict in favor of Olsen resulted, which was followed by a Judgment thereon.

Goodman appealed to the District Court of Appeal of Florida, Third District, but the Appeal was dismissed for failure to timely file a Brief by his then counsel.

Goodman's appeal was reinstated when the Supreme Court of Florida granted a Writ of Certiorari, and remanded the cause to the District Court of Appeal of Florida, Third District, to be heard on its merits. Said District Court of Appeal of Florida, Third District, subsequently affirmed the Trial Court Judgment in favor of Olsen.

Goodman again sought certiorari from the Supreme Court of Florida pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida on a claim of jurisdictional conflict between Decisions of the Supreme Court and other District Courts of Appeal of Florida, and the Per Curiam Decision of the District Court of Appeal of Florida, Third District in the case at bar.

On June 24, 1974, the Supreme Court accepted jurisdiction of the cause and directed the parties to file Briefs on the merits of the cause.

No portion of the conditional Writ of Certiorari discussed or set forth the Court's reasoning in connection with the conflict in question, and allegations of the Petition and his Petition as to the Court's reasoning in this regard are but the purest speculation by Petitioner.

Because of efforts made throughout this Petition to cast aspersions on the integrity of the Supreme Court of

Florida, totally unsupported by the Record, it is necessary to set forth as to the Decisions of the Supreme Court of Florida herein involved, the names of the Justices, concurring and dissenting.

The Supreme Court of Florida accepted conflict jurisdiction of this cause on June 24, 1974, without dissent, contrary to the Petition of Olsen (APP.B). The concurring Justices were Adkins, Chief Justice; Roberts; McCain; Dekle; and Overton. The particular Justices liberally smeared by the Petition herein are Justices McCain, Dekle and Boyd. It should be noted that of the five (5) Justices unanimously voting to conditionally accept jurisdiction, only two (2) participated, whose integrity is contested by Olsen.

Subsequently, the Supreme Court, having granted conditional jurisdiction, entertained the merits of the cause and reversed the District Court of Appeal of Florida, Third District (APP.C).

The cause was remanded to the Circuit Court of Dade County, Florida, for retrial and thus does not constitute a Final Judgment of the Supreme Court of Florida from which, under the Federal Judiciary Code, Petitioner herein may invoke certiorari.

The makeup of the Panel of the Florida Supreme Court which, having accepted certiorari, entertained the merits of the Petition and reversed the cause, and remanded it for new trial, is as follows: Adkins, Chief Justice; Roberts; McCain; Ervin; and Boyd. There was a single dissent by Justice Overton.

It should be observed in defense of the Florida Supreme Court from the aspersions cast upon it by the Petitioner, that of the aforesaid Panel, only Justice McCain has subsequently resigned from that Bench.

Justice Boyd, likewise, liberally smeared in the Petition, was not voted for impeachment by the Select House Committee involved, but was referred to mental examination to the Florida Judicial Qualifications Commission. As a result thereof, he was found fully competent; no charges are lodged against him of any nature; and he is a fully qualified, sitting and unimpeached present member of the Florida Supreme Court.

Thus, of the five (5) Justices who remanded Petitioner's cause for a new trial to the Circuit Court of Dade County, Florida, only one has been caused to resign; to-wit: Justice McCain. There was only one dissent. The foregoing actual head count of the panels of the Supreme Court granting certiorari in this cause and reversing the matter on its merits reveals the immateriality of the portions of this Petition which infer that the reversal of Olsen's case in the Supreme Court of Florida is due to improper motives or lack of integrity of the Florida Supreme Court.

Thereafter, a Petition for rehearing was filed by Olsen, which was denied on January 29, 1975. Olsen's Petition herein, with thundering inaccuracy, alleges that the aforesaid Petition for Rehearing set forth "the denial of due process of law to Olsen by the prohibition of the use of the defense of usury and jury trial, as guaranteed by the Constitution of the State of New York." Actually, no contention of denial of due process of law is made by Olsen in the said Petition for

Rehearing, nor any contention that he has been denied a jury trial, as guaranteed by the Constitution of the State of New York. In order that this Honorable Court can assure itself that this is so, the Petition for Rehearing is appended hereto as APP.D. No question of denial of constitutional rights or the failure to observe full faith and credit, or of any other purported Federal question was ever raised at any phase of the appellate proceedings in Florida, and have never before been stated in this cause, until Petitioner has sought certiorari from this Honorable Court.

On April 10, 1975, Olsen filed a Motion for Extention of Time within which to file his Petition for Writ of Certiorari to this Court, which was granted through June 27, 1975.

At the conclusion of the impeachment hearings referred to in Petitioner's Brief, Justices Dekle and McCain resigned from the Supreme Court. As pointed out, *supra*, Justice Boyd was not recommended for impeachment; was found totally competent physically to serve, and is serving now in fullest capacity as a Justice of the Florida Supreme Court. All of the matters contained in the Petition in connection with the impeachment hearings and the Justices in question are *de hors* the record, and thus have no place in a Petition to this Honorable Court for Writ of Certiorari.

There is absolutely nothing, even in the materials outside the record, presented in Petitioner's Appendix to his Brief which would indicate any irregularity, even in the assignment of the Goodman-Olsen case to Justice McCain, when Goodman's Second Petition for Writ of Certiorari reached the Supreme Court of Florida, Case

No. 45,356, the case which is the subject matter of the Petition now pending before this Honorable Court.

Appendix "G" to Olsen's Petition herein, the Affidavit of Marc H. Glick, upon which Petitioner relies for his claim of irregularity in assignment of the cause in the Florida Supreme Court, points out that he had not even completed his investigation as to how Case No. 45,356 fell before Justice McCain prior to McCain's resignation from the Court.

In lieu of any evidence to the contrary, it must be presumed that Case No. 45,356 was assigned to Justice McCain in normal rotation under the blind filing system. Certainly no evidence appears, even *de hors* the record, and presented by Affidavits contained in the Appendix of the Petitioner, that would indicate otherwise.

It is further contained in said Affidavit that the Clerk of the Supreme Court of Florida, Mr. Sid White, had testified that request for assignment of cases for Justices were uncommon and unusual. Obviously, then, such requests therefor are made and are not, per se, evidence of any improper motive and lack of integrity. Specifically, Mr. White, who made such assignments, did not recall if the Goodman-Olsen case had been requested by McCain.

The Affidavit of Marc H. Glick, para-prosecutor turned advocate in this cause, like a ballerina's tu-tu, conceals more than it reveals.

It refers to the *Lombardosi* case, a criminal matter (in which Mr. Frank Ragano represented the Defendant

convicted in the cause), as if some proof, indication or even substantial inference of wrongdoing was shown, thereby, which would implicate former Justice McCain and Mr. Ragano. Actually, no irregularity of any type was shown; and as Mr. Ragano's Affidavit (APP. "E") reveals, he testified under oath to Mr. Glick that he actually met Justice McCain for the first time in the Florida Supreme Court Building, in Tallahassee, Florida, approximately one year subsequent to the incident described by Glick in his Affidavit regarding the *Lombardosi* case. Ragano testified under oath that he had not, at any time, spoken to McCain or any other of the Supreme Court Justices of Florida regarding either the instant cause or the *Lombardosi* case.

Mr. Ragano is a criminal lawyer, who had three (3) criminal matters on appeal before the Supreme Court of Florida while Justice McCain was on that Bench. Those three (3) include *Lombardosi.* In each cause, the Supreme Court of Florida affirmed Trial Court convictions, and Ragano's three (3) criminal clients are presently serving prison terms of life, twenty (20) years, and twelve (12) years, respectively. While Justice McCain was on the Bench of the Florida Supreme Court, Mr. Ragano has lost all three (3) criminal appeals which he had taken to the Supreme Court of Florida. If there is some conspiratorial significance, as inferred by Mr. Glick and the Petitioner herein by reason of the fact that Justice McCain was on the Bench of the Florida Supreme Court during the time that Mr. Ragano appealed three (3) criminal matters to that Court, the significance is decidedly lost on Mr. Lombardosi and the two (2) other clients of Mr. Ragano now serving life, twenty (20) years, and twelve (12) years, in the Florida Prison System.

Mr. Glick's Affidavit does not reveal the foregoing, nor does it reveal that Mr. Ragano volunteered to testify before the Select House Impeachment Committee; but for the obvious reasons hereinabove set forth, Mr. Glick did not desire to present him as a witness, and excused him.

In the face of such testimony, any contention of irregularity in the handling of the cause at bar by the Florida Supreme Court or any further impugning of the motives and integrity of that body are patently absurd.

REASONS FOR NOT GRANTING WRIT

Title 28, U.S. Code, Section 1257, provides as pertinent hereto, as follows:

> "Sec. 1257 — STATE COURT; APPEALS; CERTIORARI — Final Judgments or Decrees rendered by the highest court of a State in which a Decision could be had, may be reviewed by the Supreme Court as follows . . ."

The language of the above-quoted pertinent Statute is crystal clear that this Honorable Court will review by certiorari as pertinent to the instant cause, only a Final Judgment of the highest court of Florida. The language speaks for itself, but has been highlighted and underlined many times by the Decisions of this Honorable Court.

In the case at bar, the Supreme Court of Florida reversed the District Court of Appeal of Florida, Third District, and remanded the cause for a new trial by jury (APP. C).

As a general rule, Judgment of the highest court of a State, reversing an inferior Court and remanding the case to the Lower Court for new trial, is not a Final Judgment, and hence, is not reviewable by the Supreme Court of the United States. *Urie vs. Thompson,* 337 U.S.163, 93 L.Ed.1282, 69 S.Ct.1018, 11 A.L.R.2d 252; *Gulf Refining Co. vs. U.S.,* 269 U.S.125, 70 L.Ed.195, 46 S.Ct.52; *Scott vs. Booth,* 253 U.S.475, 64 L.Ed.1020, 40 S.Ct.484; *Coe vs. Armour Fertilizer Works,* 237 U.S.413, 59 L.Ed.1027, 35 S.Ct. 625.

Case law is clear that, in general, the finality of a State Appellate Court's reversal of a Lower Court depends upon whether under State Law the effect of the reversal is to grant a new trial.

In *Gospel Army vs. Los Angeles,* 331 U.S.543, 91 L.Ed.1662, 67 S.Ct.1428, it was held that an unqualified reversal by a State Court is not a Final Judgment, for purposes of review by the Supreme Court of the United States, where the reversal operates to remand the case for a new trial.

The foregoing basic propositions of law which are applicable hereto, show that without question the language of the opinion of the Supreme Court of Florida in the cause at bar, remanding this cause for a new trial renders the reversal and the decision not a "Final Judgment" for purposes of Court review.

As this Court said in *North Dakota Pharmacy Board vs. Snyder Stores,* 414 U.S.156, 38 L.Ed.2d 379, 94 S.Ct.407:

> "(2) The finality requirement of 28 U.S.C., Sec.1257 (28 U.S.C.S., Sec.1257) which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

As Mr. Justice Frankfurter stated in *Radio Station WOW vs. Johnson,* 326 U.S.120; 89 L.Ed.2092, 65 S.Ct.1475:

> ". . . And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation (414 U.S.160) only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree'. Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344(a) (28 U.S.C.S., Sec.344(a)). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

As pointed out in *Gospel Army, supra,* a Judgment of an Appellate Court, to be final and reviewable under this Title, must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the Trial Court, except the ministerial act of entering Judgment, which the Appellate Court directed. In that case, the Judgment reversed by the

California Supreme Court had the effect, under State practice, of remanding the case for new trial. The rationale of the case conclusively applies to the cause at bar. A host of additional decisions are all to the same effect, and have been cited, supra. A typical cause whose decision is precedent for the denial of certiorari herein is *Southern Pacific vs. Gileo,* 351 U.S.493, 100 L.Ed.1375, 76 S.Ct.952. In that case where the California Supreme Court reversed decisions of Lower California Courts and remanded cases for trial on the issues of negligence and damages, the Supreme Court of the United States held that there was no "Final Judgment" of the highest court of a State, within the meaning of the Title in question; and, therefore, the United States Supreme Court lacked jurisdiction to review.

There can be little question that in view of these authorities and the specific language of 28 U.S.C., Section 1257, no jurisdiction for review is indicated herein.

As additional grounds for rejecting this Petition, it should be stated that the non-substantial Federal questions which are allegedly raised in this Petition, are raised by Petitioner for the first time in this Honorable Court, and have never been raised in any Florida proceedings, including the Petition for Rehearing before the Florida Supreme Court as to that Court's Order of reversal and remand for trial of November 7, 1974. The Court's attention is invited to the contents of the aforesaid Petition for Rehearing, which is printed in Appendix "D" herein. This Honorable Court has long since determined that it will not, in reviewing a Judgment of the highest court of a State, determine alleged Federal questions which were not seasonably presented to the State Court below.

In *Hanson vs. Denckla,* 357 U.S.235, 2 L.Ed.2d 1283, 78 S.Ct.1228, the question arose as to whether the Supreme Court of Florida was required to give full faith and credit to a decision of a Delaware Court which was raised for the first time before the Florida Supreme Court on Motion for Rehearing. This Honorable Court, in refusing to make such a determination, stated:

> "We need not determine whether Florida was bound to give full faith and credit to the Decree of the Delaware Chancellor, since the question was not seasonably presented to the Florida Court. Radio Station WOW vs. Johnson, 326 U.S.120, 89 L.Ed.2092, 65 S.Ct. 1475."

It is to be noted that at least in *Hanson,* the alleged Federal question was raised on Petition for Rehearing to the Supreme Court of Florida, whereas in the instant cause, no Federal question has been raised until the filing of this Petition. As pointed out in *Street vs. New York,* 394 U.S.576, 22 L.Ed.2d 572, 89 S.Ct.1354, if an issue, allegedly Federal, was not presented to the State Court in such a manner to be necessarily decided by the highest State Court, then the Supreme Court of the United States would have no power to consider the issue.

The foregoing rule is particularly applicable in the case, *sub judice,* where Petitioner bases a considerable portion of his application on Affidavits and matters, *de hors* the record, in addition to raising the points claimed for the first time herein. This Honorable Court will not review questions not timely raised and not clearly raised on the record; and in accordance with its own

established policy, will not go beyond constitutional or Federal issues not necessarily raised by the record. *Standard-Vacuum Oil Co. vs. U.S.*, 339 U.S.157, 94 L.Ed.731, 70 S.Ct.545; *Solesbee vs. Balkcom*, 339 U.S.9, 94 L.Ed.604, 70 S.Ct.457.

Jurisdiction of the Supreme Court of the United States on certiorari cannot be founded on surmise as to what, if any, Federal question the State Court rested its Opinion and Decision upon, nor can a claim or jurisdiction be sustained by reference to statements which are not a part of the record. This principle of law has long since been established by this Court, together with the proposition that this Court will not resort to forced inferences and conjectural reasonings or to possible suppositions as to points raised and decided by the State Court. *Awotin vs. Atlas Exchange National Bank*, 295 U.S.209, 79 L.Ed.1393, 55 S.Ct.674; *Kipley vs. Illinois*, 170 U.S.182, 42 L.Ed.998, 18 S.Ct.550. The rules of the Supreme Court of the United States itself, provide that the jurisdictional statement required to be set forth in Petitions for Certiorari must contain such pertinent matter *from the record* as will support the assertion that the State Court's Rulings are of such a nature as to bring the case within the statutory provision asserted to confer jurisdiction on the Supreme Court (S.Ct.Rule 23(1) (f)).

Accordingly, in the instant cause, without even considering what Petitioner contends are the merits of his Petition, the failure of the Petitioner to timely raise a Federal question before the Florida Courts, as well as his reliance on matters, *de hors* the record, to now claim a Federal ground, are valid and basic reasons for denial of this Petition. Petitioner has raised what he purports to be Federal questions too late and improperly.

As pointed out herein, multiple grounds exist for the denial of jurisdiction by this Court to entertain this Petition for Certiorari. Certainly, foremost among them are the facts that neither of the two (2) Questions Presented by Petitioner herein raise a substantial Federal question.

As to Question No. 1, Petitioner disagrees with the decision of the Supreme Court of Florida assuming jurisdiction of your Respondent's Petition for Writ of Certiorari, in that he contends that no conflict jurisdiction existed under Article V, Section 3(b)(3) of the Constitution of the State of Florida, and that the decision of the Supreme Court of Florida denies Petitioner due process. As pointed out, *supra*, this question is raised for the first time herein. It was not presented to the Supreme Court of Florida, even in Petitioner's Petition for Rehearing.

This Honorable Court has stated many times, and established as a solid proposition of law, that it will not review a Judgment of a State Court where the contention is that the State Court exceeded its powers under the State Constitution. A review is precluded if the decision of the State Court is upon a point of local or general law sufficient to support the Judgment. This rule is not altered by the fact that the Supreme Court may consider the position of the State Court in the non-federal or local matter as an unsound one. *Schuylkill Trust Co. vs. Pennsylvania*, 302 U.S.506, 82 L.Ed.392, 58 S.Ct.295; *DeSaussure vs. Gaillard*, 127 U.S.216, 32 L.Ed.125, 8 S.Ct.1053.

Petitioner is asking this Honorable Court to review the Judgment of the Florida Supreme Court construct-

ing its own State Constitution; and this, as the foregoing citations and many more indicate, this Court has pre-emptorily stated it will not do.

Lower Courts in Florida rejected the principle that on the facts of the case at bar, the Petitioner herein was estopped to claim usury as a defense. The facts elicited at trial were that the Petitioner, an attorney who had borrowed money from the Respondent, a layman, drew up the contract and note in question, failed to pay the obligation, and then claimed usury as a defense to litigation on the note. Respondent contended before the Supreme Court of Florida that the principles of law inherent in the rationale of the Supreme Court of Florida in *State of Florida, ex rel. The Florida Bar vs. Delves,* 160 So.2d 114, and *The Florida Bar vs. Pitts,* 219 So.2d 427, were in direct conflict with the principles of law set forth on the facts of the case at bar by the District Court of Appeal of Florida, Third District.

The Florida Lower Courts had rejected the principles claimed by your Respondent herein that Petitioner herein was estopped to claim usury as a defense, in this litigation.

In *Delves,* as in the case at bar, Delves, a Florida attorney, had borrowed substantial funds from two (2) laymen, had closed the loan transaction, and had himself drawn the promissory note in question. When suit was filed by the laymen to enforce the loan, Delves raised the defense of usury. The Supreme Court of Florida in *Delves* had increased the punishment of reprimand ordered by The Florida Bar to a twelve (12) month suspension. The Court said:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."

Inherent in the principles of law laid down by the Supreme Court of Florida in *Delves,* affirmed in *Pitts* on very similar facts, and inherent in its rationale, is the principle that in civil litigation such as the case at bar, an Attorney-Defendant being sued on a note which he, himself, had drawn, would be estopped to claim usury as a matter of law.

Certainly the principles of law inherent in the rationale of the Supreme Court of Florida in *Delves* and in *Pitts* do indeed directly conflict with the principles of law set forth as to estoppel to claim usury by the Lower Courts in Florida in this cause. The Order of the Florida Supreme Court of November 7, 1974, granting conditional certiorari, gives no opinion as a guideline to its decision; however, as pointed out, *supra;* whether or not this Honorable Court would agree or disagree and find erroneous the decision of the Supreme Court of Florida in granting jurisdiction, its own precedents clearly establish that it will not review a Judgment of a State Court where the contention is, as it is in this case, that the Supreme Court exceeded its powers under the State Constitution or made an erroneous decision as to the effect of its State Constitution. As this Court pointed out in *Brinkerhoff-Faris Trust and Savings Co. vs. Hill,*

281 U.S.673, 74 L.Ed.1107, 50 S.Ct.451, that a State Court rendered an erroneous decision on a question of State Law or overruled principles established by previous decisions on which the parties to the litigation relied, does not confer appellate jurisdiction on the United States Supreme Court. State Courts have supreme power to interpret the written and the unwritten laws of their State.

Merely because a decision of a State Court is asserted to be wrong, and because of its erroneous nature, of violating the Federal Constitution, does not confer Federal appellate jurisdiction. *Patterson vs. Colorado,* 205 U.S.454, 51 L.Ed.879, 27 S.Ct.556.

This Honorable Court has stated firmly and consistently that it must accept the construction of the highest court of a State of its own Constitution, and of its Statutes, and that the construction of same is the exclusive responsibility of State Courts. *Speiser vs. Randall,* 357 U.S.513, 2 L.Ed.2d 1460, 78 St.Ct.1332.

This Honorable Court laid the question to rest with finality in *West vs. Louisiana,* 194 U.S.258, 48 L.Ed.965, 24 S.Ct.650, when it said:

> "Whether the State Court erred in its construction of the State Constitution and Statutes . . . is not a Federal question."

The foregoing exposition of the law applicable makes it clear that the decision in the instant case of the Supreme Court of Florida, in interpreting its own Constitution, and to grant conflict certiorari is peculiarly within the province of the highest court of

the State of Florida, and its construction accordingly will be followed by Federal Courts, including this, the highest Federal Court in the land. This Honorable Court may or may not have otherwise interpreted Florida's Constitution if called upon to do so, but it is not the province of this Court, nor its function, to grant advisory opinions upon random, although interesting, propositions of law. Therefore, under Question No. 1, no substantial Federal question has been raised upon which certiorari could be granted.

In Question No. 2 sought to be raised by Petitioner, his basic contention is that the Supreme Court of Florida, in its Decision of November 7, 1974, conflicted with the Constitution of the United States by failing to apply the Laws of the State of New York governing contracts, and failing to accord a jury trial by refusing to give effect to the substantive defense of usury arising under New York contract law.

A simple reading of the Opinion of the Supreme Court of Florida in question shows clearly that the Court did indeed give full faith and credit to the Laws of New York concerning usury in contracts and did indeed reverse the Lower Courts and remand the cause for a new jury trial, *based upon its construction of New York Law.*

In its Opinion, the Court, as a threshold statement to ruling on the questions involved stated:

> "Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus."

The Court then went on to discuss and to cite various New York authorities which indicated its opinion that permitting Petitioner to interpose usury as a defense in the Lower Court trial of this cause, and to so instruct the jury thereon, was error. The Court said:

> "The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster vs. Roe, 212 App.Div. 756, 210 N.Y.S.366 (1925); aff'd. 241 N.Y. 570, 150 N.E.559 (N.Y. 1925); Moore vs. Plaza Commercial Corp., 9 App.Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y.1960); et seq.
>
> However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley vs. Eagle Ins. Co., 222 N.Y.178, 118 N.E.622 (1918); In re Bechtold's Estate, 159 Misc.725, 289 N.Y.S.838 (Surr.Ct., Clinton Co., 1936).
>
> Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter vs. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson vs. Hughitt, 31 N.Y.55 (1879); Cusick vs. Ifshin, 334 N.Y.S.2d 106, 70 Misc.2d 564, aff'd. 341 N.Y.S.2d 280, (Sup.Ct.App.Term, 1973)." (APP.C)

The Court then went on to indicate its finding that the evidence showed the intent of the parties; i.e., Goodman and Olsen, to participate in a joint venture; that is to carry out a single business enterprise for profit for the purpose of which they combined their money, efforts and skills.

The Court then found the facts of the instant cause to be analogous with those in *Orvis vs. Curtiss,* 157 N.Y.655 (1899).

The Florida Court then pointed out that under the analogous facts situation in *Orvis,* the New York Court held that these facts defined a partnership or joint venture, and that the defense of usury was not applicable. The Court delved further into the New York Law of usury and contract, citing *Cusick vs. Ifshin, supra.* The holding in *Cusick,* the Court indicated, would establish that the agreement in the instant case could not be considered usurious, because the repurchase clause with only the possibility of damage to Olsen if Goodman required repurchase by him, created a contingency, and thus there would be no certainty that an unlawful bonus to Goodman would accrue.

One of the strongest points relied upon by the Florida Supreme Court in reversing and remanding the case for jury trial apparently was the fact that the loan from Goodman to Olsen of $150,000.00 was interest-free. The Court said:

> "Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000.00 was interest-free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.
>
> Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error." (APP.C)

It is, of course, obvious from the foregoing that the Supreme Court of Florida, in the case, *sub judice,* did, in fact, apply and construe New York Law on usury and on contracts. That no one has been denied a jury trial is likewise clear, inasmuch as the Supreme Court's decision remands the cause for a jury trial. The Complaint of Petitioner herein is actually its disagreement with the construction of New York Law of contract and of usury, and he is completely begging the question by stating in his Petition that the Florida court did not apply New York Law.

Practically every paragraph of the Decision is replete with language of the Court construing the New York Law in question.

As pointed out, *supra,* it is the construction put upon New York Law by the Florida Supreme Court in the instant case with which Petitioner really disagrees. Nothing could be more clear that in order to create a reviewable Federal question under the constitutional provisions as to full faith and credit and the other constitutional points claimed by the Petitioner herein, the fact that the validity of the Laws of New York is drawn into question and actually interpreted by the Courts of Florida, must be shown and not merely the construction of New York Laws, whether erroneous or not, by the Florida Court. *Johnson vs. New York Life Insurance Co.,* 187 U.S.491, 47 L.Ed.273, 23 S.Ct.194.

In *Glenn vs. Garth,* 147 U.S.360, 37 L.Ed.203, 13 S.Ct.350, the United States Supreme Court, in denying a Writ of Error to the Supreme Court of New York, in an action under a Virginia Statute to enforce the liability of a party who had never subscribed his stock or been a transferee thereof, in fact; because of the presence of his name upon the books of the company without his consent, held that the New York Court did not deny full faith and credit to the Virginia Statute because said Court merely construed the Virginia Statute without questioning its validity. As pointed out in 74 A.L.R.716, in such a situation, even though the New York Court, without denying the validity of the Statute in question, may have construed it erroneously, such a construction does not deny to the Statute or to the Laws involved, the full faith and credit required by the Constitution. Hence, a litigant cannot complain that his rights acquired under the Laws of another State were not recognized or enforced by the Courts of the forum. The Supreme Court said, in *Glenn vs. Garth:*

"If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

A lead case in this jurisdictional area is *Banholzer vs. New York Life Insurance Co.*, 178 U.S.402, 44 L.Ed.1124, 20 S.Ct.972. In *Banholzer*, it was contended that the Supreme Court of Minnesota did not give full faith and credit to a New York Statute involving insurance, but the United States Supreme Court held that the Minnesota Court merely construed the New York Statute; and even granting that its construction was erroneous, full faith and credit were not thereby denied to the New York Statute. The Court said:

> "The Plaintiff, in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the Conway Case, and erred in its independent construction of the New York Statute.

> Granting, arguendo, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared, and its meaning was first sought at a decision of the New York Courts and then confirmed by independent care and construction."

To the same effect; and re-emphasizing the same definitive body of Federal Law, is *Lloyd vs. Matthews*, 155 U.S.222, 39 L.Ed.128, 15 S.Ct.70; and *Allen vs. Allegheny Co.*, 196 U.S.458, 49 L.Ed.551, 25 S.Ct.311.

In the instant cause, the Florida Supreme Court applied the Laws of the State of New York and the decisions of its highest court to the questions involved in the appellate proceeding in that Court, and gave not only full faith and credit to said State's Laws, but applied to its judicial decisions, as well, the principles of comity. Interestingly enough, at no place in his Petition does Petitioner contend that the Florida Supreme Court incorrectly applied the New York Law in its Opinion and in its Decision of November 7, 1974. The Court is not challenged as having been wrong in its application of law; and, therefore, the presumption is that it was correct.

But, as the foregoing exposition of case law indicates, even if the construction applied was erroneous, the validity of the Laws of New York was not challenged, and New York Law was, in fact, applied. Under the circumstances, such as exists herein, therefore, no reviewable Federal question is presented to this Honorable Court to invoke its jurisdiction on certiorari.

CONCLUSION

No grounds for invoking the jurisdiction of the Court to issue a Writ of Certiorari have been properly invoked herein.

In summarizing, the Petition herein incorrectly seeks certiorari from an Order and Decision of the Supreme Court of Florida of November 7, 1974, which was not a Final Judgment, and which remanded the cause to the Lower Court for jury trial.

The conflicts now claimed by the Petitioner with the Constitution of the United States were never raised, in any stage of the proceedings in Florida, including the Petition for Rehearing before the Florida Supreme Court, denied on January 29, 1975. They are raised now for the first time, in this Petition.

The Petition is based on matters, *de hors* the record, and thus should not be considered, being replete with irrelevant, immaterial and scandalous matter, and failing, in all respects, to comply with the applicable rules of the Supreme Court of the United States for matters required to be presented on Petition for Certiorari.

No substantial question is raised by the Petition, as is evidenced by the Petition itself.

In the first Question Presented, Petitioner has disagreed with the decision of the Supreme Court of Florida in assuming jurisdiction in Florida of the Respondent's Petition for Certiorari under the appropriate provision of the Florida Constitution. The construction of the States own Constitution by its Supreme Court is

uniquely within the province of that Court, and thus no substantial Federal ground is presented for invoking certiorari as to that point.

The final Question Presented by Petitioner claims a failure of the Supreme Court of Florida to give full faith and credit to the Laws of New York on usury and contract, resulting in further constitutional deprivations. The opinion of the Court itself shows clearly that full faith and credit to the Laws of New York was given by the Florida Court, and that the Florida Supreme Court merely construed the applicable New York Law in a way unfavorable to, and disapproved by, the Petitioner. The Petitioner has never challenged said construction of New York usury law by the Supreme Court of Florida as erroneous.

In any event, whether correct or whether erroneous, New York Law was applied to the cause at bar, and the construction thereof by the Florida Supreme Court presents no grounds for invoking the jurisdiction of this Court for certiorari.

For the foregoing reasons, we respectfully urge that this Court deny certiorari and dismiss the Petition therefor, forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorney for Respondent
1680 N.E. 135th Street
North Miami, Florida 33181

APPENDIX

APPENDIX "A"

"Dear Saul,

As per our joint venture, it is agreed that you shall put up the sum of $300,000.00 of which sum I am borrowing $150,000.00. Said funds shall be used to purchase 50,000 shares of Omega Equities, Incorporated, common stock, under an investment letter. You shall own 25,000 of these shares, and I shall own the other 25,000, which I pledge to you as collateral on the above loan.

I agree to repay the above $150,000.00 to you by May 31, 1969. I further agree to purchase from you, in the event you desire to sell to me, your 25,000 shares of the above stock at a price of $10.00 per share. Said purchase to take place between October 1, 1969, and December 21, 1969. In the event, I fail to pay the purchase price of said stock within ten days from tender of same, you may sell said shares, and I shall be liable to you for any sums less than $10.00 per share.

I agree not to sell any of my shares prior to December 31, 1969, without your prior written consent unless all my obligations to you in this joint venture have been satisfied.

I agree to take out a life insurance policy in the sum of $400,000.00 made payable to you, said policy to stay in good standing until the conclusion of this agreement. I shall pay the premiums on said policy, and you shall be the owner of same.

It is understood that said shares of Omega stock shall be held jointly by us as Trustees, and that said stock shall be 50,000 shares of a 100,000 share certificate. The other 50,000 shares shall be held by us as Trustees until

registration, at which time they shall be registered in the respective owners' names. At time of registration, the 50,000 owned by us shall be registered, 25,000 shares in your name, and in the event I have an obligation still due and owing to you, 25,000 shares in our joint names, otherwise in my name.

Very truly yours,

Richard H. Olsen,
Palm Bay Club,
Miami, Florida 33135."

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974
MONDAY, JUNE 24, 1974

SAUL GOODMAN,	**	
Petitioner,	**	
vs.	**	WRIT OF CERTIORARI
RICHARD H. OLSEN,	**	CASE NO. 45,356
Respondent.	**	

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Friday, September 13, 1974.

A maximum of 15 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

Either side may waive oral argument. If both sides waive oral argument the case will be promptly assigned for decision and the cause expedited.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5(c)(6), F.A.R.

ADKINS, C.J., ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur

A True Copy
TEST:

/s/Sid J. White
Sid J. White
Clerk Supreme Court.
By: Sara Gainey, D.C.

sg
cc: Honorable William P. Carter, Clerk
Law Offices of Leo Greenfield
Messrs. Prunty, Ross, DeLoach & Olsen

APPENDIX "C"

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN, *Petitioner,* *v.* RICHARD H. OLSEN, *Respondent.*	:	CASE NO. 45,356 DCA CASE NO. 72-798

Opinion files November 7, 1974
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending

upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106. 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin, supra.*

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000

was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX "D"

IN THE SUPREME COURT OF FLORIDA
CASE NO. 45,356
DCA CASE NO. 72-798

SAUL GOODMAN, *Petitioner,*	)	
vs.	)	PETITION FOR RE-HEARING
RICHARD H. OLSEN, *Respondent.*	)	

Respondent, RICHARD H. OLSEN, moves this Court to withdraw and set aside the Opinion filed November 7, 1974 and to grant a re-hearing in the above cause upon the following grounds: [For ease of reference a copy of the Court's Opinion is attached with numbered paragraphs which are referred to herein.]

1. This Court attempts to take jurisdiction on the basis of conflict under Article V, Section 3(b)(3) of the Constitution of the State of Florida utilizing as a basis for conflict two Florida cases cited in the Petition, dealing completely with violations of professional ethics by lawyers under the Florida Integration Rule,[1] but at the same time this Court has in its Opinion (Page 2, Paragraphs 7 and 8) readily admitted that the laws of

[1] *State of Florida ex. Rel., The Florida Bar v. Delves*, 160 So. 2d 114; *Florida Bar v. O. E. Pitts*, 219 So. 2d 427.

the State of New York, and the decisional interpretations thereof, must control with reference to the construction of the contract herein involved. Thus this Court's Opinion makes it obvious that no conflict exists.

2. The Court has failed to recognize in its Opinion (Page 1, Paragraph 2) that the Goodman-Olsen agreement was not "characterized" as a loan by Goodman to Olsen, but, in fact, spelled out specifically that the sum of $150,000.00 was a direct loan, and further set forth specifically the terms of repayment and the interest profit which Goodman was to receive.

3. The Court on Page 2, Paragraph 4 of the Opinion has wholly failed to recognize that the repayment on the loan was $50,000.00 and not $60,000.00. The sum of $10,000.00 having been demanded as additional interest or a rebate by the lender, Goodman, prior to permitting the check for the total amount given to Olsen to be cleared.

4. The Court indicated on Page 2, Paragraph 5 of its Opinion, a failure to clearly examine the record which shows that Goodman filed a suit not for the $90,000.00 balance of the loan, but upon a claim for $150,000.00. Moreover, the record further supports the fact that after the payment of $50,000.00 was made Goodman still sought to claim the balance of the debt to be $100,000.00, thus again verifying that the $10,-000.00 initially demanded by Goodman was a payment of interest and not principal. Furthermore, the record clearly shows that Olsen's defense had two aspects, (1) the initial payment of $10,000.00, extracted by Goodman, which was not part of the agreement and constituted usury and (2) the buy back portion of the agreement demanded by Goodman which likewise constituted a usurious bonus to Goodman.

5. While the Court in its Opinion on Page 3, Paragraph 9 sets forth the proper general rule of the law of New York on the subject of usury, the Court subsequently misapplies completely this rule of law by interpreting the buy back provision of the agreement to be a contingency over which the borrower has control when, in fact, the borrower, Olsen, had no control over the contingency and was at the mercy of the lender, Goodman. The only contingency aspect of the transaction was that Goodman might not demand the repurchase of the stock, but clearly he had the power to make such a demand and this contingency was completely within his control, thus usurious, and not within the control of Olsen. This usurious provision of the contract has been completely by-passed by this Court.

6. The Court on Page 3, Paragraphs 9 and 10 of the Opinion cites cases involving general law of New York which are completely dissimilar and involve factual situations which are far removed from the factual situation in the case at bar and have no reasonable application to the issue of contingency or joint venture.

7. The Court in the Opinion on Page 3, Paragraph 12 agrees with the settled decisional law that the language contained in the agreement is not controlling, but that the answer lies in the intent of the parties, thereby clearly indicating a holding that such a factual situation is for the determination of a jury and not the Court. Although, the jury made a full determination on this factual situation, to the effect that usury was present, this Court has taken these issues of fact completely away from the jury and has undertaken to become a trial forum for the determination of facts.

8. This Court attempts on Page 4, Paragraphs 14 and 15 of the Opinion to utilize as support for its position the case of *Orvis v. Curtiss*, 157 N.Y. 657; 52

NE 690 (CA NY 1899) and has quoted liberally therefrom. However, it is interesting to find that a careful reading of the *Orvis* case fails to disclose the quotation cited. Nor does the case refer to musical instruments, nor are musical instruments mentioned anywhere in the case. Apparently the factual situation attributed to the *Orvis* case was obtained in part from the case of *Salter v. Havivi*, 215 N.Y.S. 2d 913 (Sup.Ct. NYCo. 1961). A case which again fails to reflect the factual situation of the case at bar. In both *Orvis* and *Salter* there was no loan, whereas in the present case the agreement itself specifically refers to a loan and the terms of repayment. In quoting from the *Salter* case the Court has failed to use both of the examples set forth on Page 916 of the reported case. Example number 1 which is determined to be usurious is the one which obviously fits the case at bar and which was omitted in the preparation of the Court's Opinion. It reads as follows:

> "Case No. 1. H. comes to S. and says to him: "I am thinking of going into the business of trading in old, rare musical instruments but this requires a lot of capital which I do not have. You have the money. I would like you to lend it to me." S. answers: "I shall lend you the money on the condition that you will repay the loan with 6% interest and if you make a profit in your business, you will give me 50% of it after first deducting all legitimate expenses"."

[A copy of the *Salter* case is attached hereto for reference.]

9. This Court has completely ignored the issue of usury consisting of the demand by Petitioner, Goodman, and the payment to him of $10,000.00 at the inception of the transaction. After Petitioner, Goodman, had given Respondent, Olsen, his check for the stock and the check had been paid to the company for the purchase of the stock, Petitioner, Goodman, advised Respondent, Olsen, he had stopped payment on the check and would only let it clear collection if he were paid the $10,000.00. Although this matter was argued at length by the Respondent, Olsen, and no reply was ever made thereto by the Petitioner, Goodman, it still remains a completely undecided issue as far as the Opinion of this Court is concerned. It can only be concluded that the failure of the Court to respond to this issue is indicative that this Court has not fully reviewed all of the facts and issues put before the Court. On this point the Court has chosen to completely disregard the case of *Breunich v. Wesselman*, 100 N.Y. 609, 2 NW 385, which case fits precisely the factual situation of the case at bar and is determinative of the issues. [A copy of the *Breunich* case is attached for reference].

10. This Court by its Opinion on Page 5, Paragraphs 17, 18 and 19 seeks to deprive the Respondent of the utilization of the defense of usury in a retrial of this cause. The issue of usury having already been determined by a jury, the Respondent is entitled, if this Court views some procedural errors to have occurred, to at least to have that issue re-tried by the jury. In refusing this right this Court is casting itself in the role of trial judge and trial jury and has proceeded to erroneous conclusions in its attempted determination of the facts and the applicable law.

WHEREFORE, the Respondent respectfully urges this Court to grant a re-hearing in this cause in that the

present Opinion of this Court improperly grants jurisdiction and further is contrary to the facts and the law applicable thereto and fails to pass upon essential issues presented to the Court.

Respectfully submitted,

PRUNTY ROSS DeLOACH & OLSEN
Attorneys for Respondent
837 City National Bank Bldg.
Miami, Florida 33130

By/s/ John W. Prunty
JOHN W. PRUNTY

I HEREBY CERTIFY that a true copy of the foregoing Petition for Re-Hearing was mailed to Frank Ragano, Esq., 28 W. Flagler Street, Suite 400, Miami, Florida, 33130 and to Law Offices of Leo Greenfield, P.A., 1680 NE 135th Street, Suite 200 West, North Miami, Florida, 33161 Attorneys for Petitioner, on the 9th day of December, 1974.

/s/ John W. Prunty
Attorney

APPENDIX "E"

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

(THE AFFIDAVIT OF FRANK RAGANO, *DE HORS* THE RECORD, IN RESPONSE AND IN CLARIFICATION OF THE AFFIDAVIT OF MARC H. GLICK

BEFORE ME, the undersigned authority, on this date, personally appeared FRANK RAGANO, who, upon being first duly sworn, under oath, deposes and says:

1. I am FRANK RAGANO, a Miami and Tampa attorney, referred to by Mr. Marc H. Glick in his Affidavit offered in personal support of the Petitioner's cause, and printed as Appendix "G" to Petitioner's Petition in the case of *Olsen vs. Goodman.*

2. In the interests of justice, and to clarify certain scurrilous and scandalous allegations made by Mr. Glick in his Affidavit, I am presenting herein additional clarifying facts in order that the true picture of the matter may be presented to this Honorable Court.

A. That during the period of time that the Impeachment Committee described in Glick's Affidavit was conducting hearings, I was subpoenaed by Marc H. Glick, and appeared before him at his office in Tallahassee, Florida, at which time he took my deposition. That I was questioned at length in regard to the cases of *Lombardosi vs. Wainwright,* Case No. 41,0001; and *Goodman vs. Olsen,* Case No. 43,168. It is to be noted that the Defendant, Lombardosi, received a twenty (20) year prison sentence, which is presently being served, and which conviction was affirmed by the

Supreme Court of Florida, with Justice McCain participating. That I testified under oath that I met Justice David McCain for the first time in the Supreme Court Building, approximately one year subsequent to the time of the alleged incident that Marc H. Glick describes in his Affidavit, in regard to the Lombardosi case.

I further testified that I had not, at any time, under any circumstances, spoken to Justice McCain, or any of the other six (6) Supreme Court Justices of Florida regarding the *Goodman vs. Olsen* case, or the *Lombardosi* case. In addition thereto, I testified that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, I had three (3) criminal cases before said Court, and that certiorari was denied, in each one of those cases, and that the Defendants therein subsequently began serving prison terms of life imprisonment, twenty (20) years imprisonment, and twelve (12) years imprisonment. That Affiant is primarily a defense lawyer in criminal cases, and that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, this Affiant lost all three (3) criminal cases that he had before the Supreme Court of Florida.

B. That upon the completion of the taking of my deposition by Marc H. Glick, I volunteered to go before the Select House Impeachment Committee, and was informed by Marc H. Glick that he would not require my appearance, and he excused me.

C. At no time have I ever discussed the *Goodman vs. Olsen* case with Justice McCain, or any other Member of the Supreme Court of Florida, as I testified under oath at the above described time and place.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Frank Ragano
FRANK RAGANO

Sworn to and subscribed before
me this 18th day of July, 1975.

/s/ Rose E. Fink
Notary Public, State of Florida
at Large

My Commission expires:
December 5, 1977

Supreme Court, U.S.
SEP 10 1975
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1610

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

REPLY TO BRIEF IN OPPOSITION

Robert D. Peloquin, Esquire
Counsel for Petitioner
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MIAMI REVIEW — 371-4853 — 377-3721

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

No.

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

REPLY TO BRIEF IN OPPOSITION

In accordance with the provisions of Rule 24.4, this Reply will be limited to arguments first raised in Respondent's Brief in Opposition.

I

Respondent asserts that the Judgment of the Supreme Court of Florida entered November 7, 1974, remanding the cause for retrial, was not a Final Judgment.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 497 (1975), this Court discussed at length the question of what constitutes a final judgment under 28 U.S.C. 1257. It concluded that there are now at least four categories of cases wherein it has treated resolution of a Federal issue by a State Supreme Court as a "final judgment" for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting completion of additional proceedings in lower State courts. Though each category has merit and applicability to the case *sub judice*, the first category is directly on point.

In describing the category of cases, this Court said:

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained.* In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took

jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at the trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in the judicial systems already troubled by delays due to congested dockets.' Id., at 217-218." (emphasis supplied.)

In the instant case, the Supreme Court of Florida reversed the *per curiam* affirmance by the District Court of Appeal of the jury verdict in favor of the Petitioner. The Court remanded the case to the trial Court for a new trial but struck the defense of usury, the only defense interposed by the Petitioner at the trial. Though this case was tried in Florida the applicable law was that of New York where the defense of usury is a substantive defense and is available to the Petitioner. The Florida Supreme Court, by its refusal to give effect to a substantive defense permitted under the laws of New York, denied the Petitioner due process of law and subjected him to irremedial liability. Without the defense of usury, the outcome of further proceedings is preordained. Hence, the Judgment of the Supreme Court of Florida is for the purpose of this appeal a "final judgment or decree."

Additional cases supporting this position are: *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Pope v. Atlantic C.I.R. & Co.*, 345 U.S. 379 (1953).

II

Respondent asserts that the questions raised in the Petition for a Writ of Certiorari were not raised below.

The controlling principle as to a sufficient presentation of a Federal question is set forth in the case of *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63 at 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928), where this Court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground thereof be brought to the attention of the state court with fair precision and in due time. And, if the record as a whole shows either expressly of by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

The proceedings in this case at the trial and District Court of Appeal level involved no Federal questions and matters herein were properly considered and determined. The Federal issues involved arose from the Judgment of the Supreme Court of Florida on November 7, 1974, where the Court reversed the Trial Court and District Court of Appeal. Substituting itself for the jury as the trier of fact, that Court not only misconstrued the facts of the case but refused to apply the applicable New York law. The first and the only opportunity available to the Petitioner to raise a Federal question and contest the judgment of the Supreme Court of Florida was in the Petition for Re-

hearing. Thus, the raising of issues which are inherently federal questions at that time should be construed as timely and proper. As will be seen in Respondent's Appendix D, Petitioner in Paragraph 1 of his Petition for Re-Hearing, raised the question of the Supreme Court of Florida applying Florida decisions on Florida law in a cause where the laws of the State of New York governed.

III

Respondent's Brief urges that this Court will not review the judgment of the Supreme Court of Florida as to its jurisdiction in this matter under the Florida Constitution.

The general rule adopted by this Court that it will not review a judgment of a State Court where it is contended that the court exceeded the powers granted it by the State Constitution should not be followed blindly but should be considered in light of all of the facts surrounding the case.

The Supreme Court of Florida itself recognized, in the case of *Nielsen v. The City of Sarasota*, 117 So.2d 731 (1960), that its power to issue writs of certiorari was substantially restricted and drastically circumscribed by the adoption of a Constitutional Amendment in July of 1957. To clarify the criteria necessary to obtain conflict jurisdiction for a writ of certiorari, the Court, in the case of *Kyle v. Kyle*, 139 So.2d 885, at 887 said:

> "We have said that conflict must be of such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter."

In the case *sub judice* two Florida cases, *State of Florida, ex rel, The Florida Bar v. Delves*, 160 So.2d 114, (1964), and *The Florida Bar v. Pitts*, 219 So.2d 427 (1969), were presented to the Florida Supreme Court to support conflict jurisdiction necessary for the issuance of a writ of certiorari. Both of these cases concerned themselves with the disciplining of attorneys, initiated by the filing of a grievance with the Florida Bar Association, which grievance is governed by the Integration Rules of that Association. The Integration Rules, quasi-criminal in nature, are administrative regulations relevant only to Florida proceedings. The Respondent, in his Brief In Opposition To Petition For Writ of Certiorari, on pages 22 and 23, admits that both the *Delves* and *Pitts* cases, *supra*, set forth the *Florida* law on estoppel to claim usury by an attorney. The Florida law is not applicable to this case and the issues are governed by the statutory laws of New York. Thus no conflict can exist. How, then, can the Supreme Court of Florida justify its assertion of jurisdiction on the basis of conflicting decisions where the cases cited by it have absolutely no application to New York law, in a proceeding where only New York law is applicable?

Unlike the *Delves* and *Pitts* cases, the present case does *not* involve a disciplinary proceeding against an attorney. On January 22, 1973, while Respondent's initial Petition for a Writ of Certiorari was pending before the Florida Supreme Court, Respondent filed a grievance with the Florida Bar Association against the Petitioner on charges similar to those alleged in the respondent's Brief in Opposition. After a full investigation and hearing, the Grievance Committee entered a Notice of No Probable

Cause. A copy of the Grievance, Notice of Hearing and Determination are printed as Appendices A, B, and C hereto.

It is appropriate at this time to correct a misconception which runs throughout Respondent's Brief. A reading of the Brief in conjunction with the *Delves* and *Pitts* cases *supra*, would lead one to believe that the Petitioner had alone prepared the agreement, but this is not so. The facts of record are that although the agreement was handwritten by the Petitioner, the terms and conditions were dictated to the Petitioner by the Respondent. Printed as Appendix D hereto are pages 224 and 225 of the Trial Transcript.

In examining the Supreme Court of Florida's assertion of jurisdiction, this Court should consider the matter in light of the uncontradicted testimony taken at the Impeachment Hearings held on three of the Justices who sat on Panels adjudicating this case. The Impeachment Committee Hearings were held subsequent to the Judgment entered by the Court, and the testimony and exhibits showed serious irregularities in the handling of this case.

By way of illustration, the records of the Supreme Court of Florida in this case (previously confidential), on the first appeal show that a vote was taken on the matter of jurisdiction and the vote was four to one to deny same. Justice McCain was one of the four who voted to deny. A memorandum was prepared recommending denial (Appendix H, Pages A-26, 27, Petition for Writ of Certiorari). No order issued from the Court, however, denying jurisdiction. Instead, a conference was held on Feb-

ruary 1, 1973, (Appendix H, Page A-22, Petition for a Writ of Certiorari) and the case was subsequently reassigned, which is irregular in itself, to Justice McCain who then wrote a memo on jurisdiction on February 5, 1973, recommending grant of jurisdiction without oral argument. This was done by a vote of four to one. A copy of the instrument showing the two votes is printed as Appendix E hereto. This document was obtained from the Clerk of the Supreme Court of Florida subsequent to the filing of Petitioner's Petition for a Writ of Certiorari with this Court. The existence of this document was not known at the time of the filing of the Petition.

The Petitioner does not seek to challenge the integrity of certain members of the Panels who sat in judgment in this cause but does seek to have this Court closely examine all of the actions of the Court in the handling of the instant case.

Respectfully submitted,

/s/ Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

John W. Prunty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 33130

APPENDIX

APPENDIX A

January 22, 1973

Received
Mar. 8, 1973
THE FLORIDA BAR
Miami Office

Board of Governors
Florida Bar
Tallahassee, Florida

Attention: Marshall Cassedy, Esquire,
Executive Director

Re: Richard H. Olsen
Request for Investigation and
Disciplinary Action

Gentlemen:

I am writing to request that a full investigation be made into certain actions of the above named attorney, who is practicing law in Miami, Dade County, Florida. These actions occurred while this attorney was representing me.

I had known Mr. Olsen for a good period of time prior to 1968, when he sought me out and discussed with me the possibility of investing in Omega Equities Corporation. Mr. Olsen persuaded me to purchase 25,000 shares on my own account for $150,000.00, and persuaded me to lend him $150,000.00 so that he could purchase 25,000 shares, as well. He agreed to repay me the $150,000.00 with no interest on or before May 31, 1969.

This agreement was reached on September 17, 1968, when Mr. Olsen drew up a contract providing for the

same. We also agreed that if I wished to sell the Omega stock between October 1, 1969 and December 31, 1969, that he would repurchase the same from me at a price of $10.00 a share.

On September 18, 1969, I gave a check to Richard Olsen, as Trustee, for the amount of $300,000.00. He purchased the stock accordingly.

Mr. Olsen repaid $60,000.00 of the $150,000.00 he had borrowed from me, but subsequently refused or was unable to pay the balance and I was forced to institute suit seeking collection of the balance of my money on the $150,000.00 loan.

Mr. Olsen answered by contending that the contract (which he, himself, had drawn by hand) was usurious, and that, therefore, he had no responsibility to pay the same.

The aforementioned suit is still on appeal to the District Court of Appeal of Florida, Third District. In the lower court Plaintiff's motions for summary judgment and for directed verdict were denied and the case was sent to the jury, the lower court refusing to hold that the contract, on its face, was not usurious. The jury came back with a verdict for the Defendant, Olsen.

The gist of my request for an investigation into Mr. Olsen's conduct is the fact that he borrowed this $150,000.00 from me, himself drew the very contract which he contended in court was usurious, and so far has abused his position of trust with me as attorney in using the law to circumvent repayment to me of a just debt which he has incurred.

It has recently come to my attention that the Florida Bar will not condone such conduct on the part of an attorney under the circumstances as exist in this situation. I have had the opportunity to read over the case of The Florida Bar v. O. E. Pitts, cited at 219 So.2d 427, and it appears that the circumstances of that case are exactly the same as the circumstances which have been imposed upon me by Mr. Olsen.

Accordingly, I respectfully request that an investigation be made of this matter and that hearing be held to determine Mr. Olsen's fitness to continue in the practice of law.

Very truly your,

/s/ Saul Goodman

Saul Goodman

cc: Dade County Bar Association
Grievance Committee
111 N.W. 1st Avenue
Miami, Florida

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	**NOTICE OF HEARING**
	)	(A Confidential Procedure
vs.	)	Under The Rules of
	)	Discipline)
RICHARD OLSEN	)	

Complainant: SAUL GOODMAN

TO: Accused Attorney:

RICHARD OLSEN
837 City National Bank Building
25 West Flagler Street
Miami, Florida 33131

RE: File No: 11J73-5
Bar Counsel: MICHAEL FITZGERALD
Subject: Possible violation of Canon 1 DR1-102(a)(1) and (a)(4); Canon 4 DR4-101(b)(2)(3); and Canon 5 DR5-101(a) and 104(a), in re: dealings with Saul Goodman.
TIME: 7:00 o'clock P.M.,
TUESDAY, AUGUST 14, 1973
PLACE: Fifth Floor, Dade County Courthouse,
Miami, Florida

TO COMPLAINANT

You are requested to attend this hearing at the time, date and place above stated, to give evidence and to bring with you all papers pertaining to this matter. You may bring with you any witnesses which you feel may be of help to this Committee in its investigation. You may be represented by counsel, if you desire.

You are advised that these proceedings are confidential. The existence of this investigation and the identity of the Attorney are to remain confidential and should not be discussed by you with anyone other than the witnesses you are actually bringing to the hearing. This matter has been assigned to one of the Committee Members to investigate as indicated above. Please feel free to call him if you have any questions. Your cooperation is appreciated.

TO ACCUSED ATTORNEY

Grievance Committee "J" will sit at the time and place indicated above for the purpose of investigating alleged misconduct. Please contact the indicated investigator if you are not already fully aware of the nature of the complaint and for such further information as you need to furnish a reply. The Committee advises you that it is helpful to the Committee if you will furnish to the investigator a written reply far enough in advance of the hearing so that the investigator and other members will have time to review same prior thereto.

You are hereby notified of the following: Your right to appear at the hearing in person, by or with counsel; to furnish a written or verbal statement, sworn or un-

sworn, or by all of the foregoing. At the hearing you may then and there explain, refute or admit the alleged misconduct. Said hearing will be held pursuant to the authority of the Integration Rule of The Florida Bar. Your attention is particularly directed to Article XI, Rule 11.04 of said Rule. Upon your failure to attend said hearing, these proceedings will be conducted in your absence.

* * *

I HEREBY CERTIFY that a true copy of the foregoing was mailed to the accused attorney by Certified Mail RRR, the Complainant, The Florida Bar, and to all Committee Members this 30th day of July, 1973.

ELEVENTH JUDICIAL
CIRCUIT GRIEVANCE
COMMITTEE "J"
111 N.W. First Avenue
Miami, Florida 33128

By /s/ James E. Glass
JAMES E. GLASS, Chairman

CM #396557

APPENDIX C

THE FLORIDA BAR
Tallahassee, Florida 32304

Reply To: GRIEVANCE COMMITTEE "J"
1002 Ainsley Building
Miami, Florida

Case No. 7J 73-5 Date: August 28, 1973

CONFIDENTIAL

To: Complainant Mr. Saul Goodman
c/o Bonell
5750 Collins Avenue, Apt. 4-J
Miami Beach, Florida

NOTICE OF NO PROBABLE CAUSE

The complaint recently filed with the grievance committee against a member of The Florida Bar, assigned the indicated case number, was carefully investigated and considered by the committee. The committee found insufficient evidence to show a violation of professional ethics and closed the case.

/s/ James E. Glass
James E. Glass
Chairman
Judicial Circuit Grievance
Committee "J"

cc: Staff Counsel, The Florida Bar
Designated Reviewer
Richard H. Olsen

APPENDIX D

* * *

[224] Q Now, who actually had requested that this agreement, Plaintiff's Exhibit 1, be prepared and drawn?

A Mr. Goodman did.

Q Where was that, sir?

A The first knowledge of putting the agreement in writing was after I arrived in New York, and it was at the meeting with Jean Jackson, originally at the Hampshire House.

Q Now, this might be construed as somewhat of an informal agreement, since it is in your handwriting. Were you willing to enter into a more formal agreement if requested?

A Yes, sir. I had no objections and advised him as such.

Q Now, why was the paragraph included in the agreement which provided that you must buy back Mr. Goodman's stock at $10 per share?

A Mr. Goodman insisted that it be put in the agreement to guarantee a repurchase of the stock so he could make a profit. Otherwise, he would not [225] loan the money.

Q Did he state how much profit he wanted?

A $100,000.

Q What that a condition to making the loan?

A It was an absolute condition.

Q Now, Mr. Goodman has stated that he wanted nothing in return for the loan; is that correct?

A No, sir, that's incorrect. I wouldn't give him $100,000 or commit myself to a hundred thousand dollar payment just to give it away.

He had stated that it must go into the agreement, and he wanted it in writing, because the original discussion on this was a simple note from me for $150,000, which I was to give him, and when I got up there he changed.

He said, "I want this in writing," and that was the result, the agreement that was drafted.

Q Have you computed what the rate of interest on $100,000 would be on this transaction?

A Yes, sir. That loan was for eight months and thirteen days, and the interest comes out to—I believe it's 107.84 per cent.

Q That is on $150,000?

A Yes, sir.

APPENDIX E

DETERMINATION OF JURISDICTION
CERTIORARI

IN THE SUPREME COURT OF FLORIDA

CASE NO: 43168

FILED
DEC 18 1972
CLERK SUPREME COURT

SAUL GOODMAN, :
Petitioner, :
vs :
RICHARD H. OLSEN, :
Respondent. :

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, SAUL GOODMAN, presents this, his Petition for Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an order of the District Court of Appeal, Third District, dated the 17th day of November, 1972, and filed in the records of said District Court on the same date in Minute Book 47, Page 131.

2. This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This Petition is accompanied by a transcript of so much of the proceedings as Petitioner seeks to have reviewed including the decision Petitioner seeks to have reviewed together with a true and correct copy of the Transcript of Testimony. Since a certified copy of the Transcript of Testimony was heretofore delivered to Appellee counsel we are not delivering the Appellee an additional Transcript of Testimony but only that portion of the Trans-